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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 IN RE HP SECURITIES LITIGATION,

Master File No. C-12-5980 CRB

15 This Document Relates To: All Actions

CLASS ACTION

**LEAD PLAINTIFF'S OMNIBUS
MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANTS'
MOTIONS TO DISMISS**

16 Date: November 8, 2013

17 Time: 10:00 a.m.

18 Judge: Honorable Charles R. Breyer

19 Room: 6 - 17th Floor
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	<i>No. 84 Emp'r-Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp.</i> ,	
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	<i>Nordstrom, Inc. v. Chubb & Son, Inc.</i> ,	
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1	<i>Nursing Home Pension Fund, Local 144 v. Oracle Corp.</i> ,	
2	380 F.3d 1226 (9th Cir. 2004)	52
3	<i>Paracor Fin., Inc. v. GE Capital Corp.</i> ,	
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9	<i>Plumbers Union Local No. 12 Pension Fund v. Ambassador's Grp.</i> ,	
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11	<i>Provenz v. Miller</i> ,	
12	102 F.3d 1478 (9th Cir. 1996)	31, 49
13	<i>Providence v. Aeropostale, Inc.</i> ,	
14	2013 U.S. Dist. LEXIS 44948 (S.D.N.Y. 2013)	31, 34
15	<i>Reiger v. Price Waterhouse Coopers LLP</i> ,	
16	117 F. Supp. 2d 1003 (S.D. Cal. 2000)	20
17	<i>Ret. Sys. v. Bank of Am. Corp.</i> ,	
18	2012 U.S. Dist. LEXIS 129529 (S.D.N.Y. Aug. 2012)	43
19	<i>Ret. Sys. v. Bank of Am. Corp.</i> ,	
20	2012 U.S. Dist. LEXIS 96317 (S.D.N.Y. 2012)	43
21	<i>Ret. Sys. v. Psychiatric Solutions, Inc.</i> ,	
22	2011 U.S. Dist. LEXIS 35661 (M.D. Tenn. 2011)	29, 30
23	<i>Reves v. Ernst & Young</i> ,	
24	507 U.S. 170 (1993)	<i>passim</i>
25	<i>Rodriguez v. Countrywide Homes</i> ,	
26	2008 U.S. Dist. LEXIS 82874 (E.D. Cal. 2008)	54
27	<i>Ronconi v. Larkin</i> ,	
28	253 F.3d 423 (9th Cir. 2001). Dkt. No. 139 at 6	37
	<i>Rosenbaum Capital, LLC v. McNulty</i> ,	
	549 F. Supp. 2d 1185 (N.D. Cal. 2008)	31
	<i>Roth v. OfficeMax, Inc.</i> ,	
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1	<i>S. Ferry LP v. Killinger</i> ,	
2	542 F.3d 776 (9th Cir. 2008)	<i>passim</i>
3	<i>Saltz v. First Frontier, L.P.</i> ,	
4	485 F. App'x 461 (2d Cir. 2012)	20
5	<i>Sapirstein-Stone-Weiss Found. v. Merkin</i> ,	
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7	<i>Schiller v. Physicians Res. Grp., Inc.</i> ,	
8	2002 WL 318441 (N.D. Tex 2002)	23
9	<i>Schwarz v. Thinkstrategy Capital Mgmt. LLC</i> ,	
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16	2009 U.S. Dist. LEXIS 104689 (C.D. Cal. 2009)	29
17	<i>Siemers v. Wells Fargo & Co.</i> ,	
18	2006 U.S. Dist. LEXIS 60858 (N.D. Cal. 2006)	54
19	<i>Slayton v. Am. Express Co.</i> ,	
20	604 F.3d 758 (2d Cir. N.Y. 2010)	50
21	<i>South Cherry St., LLP v. Hennesee Group LLC</i> ,	
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23	<i>Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.</i> ,	
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25	<i>Stephenson v. Pricewaterhousecoopers, LLP</i> ,	
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27	<i>Steward Int'l Enhanced Index Fund v. Carr</i> ,	
28	2010 U.S. Dist. LEXIS 5047 (D.N.J. 2010)	33
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	784 F. Supp. 2d 373 (S.D.N.Y. 2011)	27, 49
	<i>Swartz v. KPMG LLP</i> ,	
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1	<i>Teamsters Local 617 Pension & Funds v. Apollo Group, Inc.</i> ,	
2	633 F. Supp. 2d 763 (D. Ariz. 2009)	<i>passim</i>
3	<i>Tellabs, Inc. v. Makor Issues & Rights, Ltd.</i> ,	
4	551 U.S. 308 (2007)	<i>passim</i>
5	<i>Tripp v. Indymac Fin. Inc.</i> ,	
6	2007 WL 4591930 (C.D. Cal. 2007)	36
7	<i>Virginia Bankshares v. Sandberg</i> ,	
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9	<i>Warshaw v. Xoma Corp.</i> ,	
10	74 F.3d 955 (9th Cir. 1996)	29, 34
11	<i>Wenger v. Lumisys, Inc.</i> ,	
12	2 F. Supp. 2d 1231 (N.D. Cal. 1998)	34
13	<i>Westley v. Oclaro, Inc.</i> ,	
14	897 F. Supp. 2d 902 (N.D. Cal. 2012)	30
15	<i>Wozniak v. Align Tech.</i> ,	
16	850 F. Supp. 2d 1029 (N.D. Cal. 2012)	37, 39
17	<i>Zelman v. JDS Uniphase Corp.</i> ,	
18	376 F. Supp. 2d 956 (N.D. Cal. 2005)	26
19	<i>Zucco Partners, LLC v. Digimarc Corp.</i> ,	
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21	STATUTES	
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TABLE OF ACRONYMS

CAGR	Compound annual growth rate
DCF	Discounted cash flow
DSO	Days sales outstanding
FASB	Financial Accounting Standards Board
FASC	Financial Accounting Standards Codification
FQ	Fiscal quarter
FTSE	Financial Times and Stock Exchange
FY	Fiscal year
GAAP	Generally Accepted Accounting Principles
IDOL	Intelligent Data Operating Layer, a platform by Autonomy that enables computers to search and process text taken from databases, audio, video, text files or streams
IFRS	International Financial Reporting Standards
IP	Intellectual property
IPR&D	In-process research and development
IT	Information technology
LSE	London Stock Exchange
M&A	Mergers and acquisitions
MAC	Material adverse change
MD&A	Management Discussion and Analysis
O/S	Overstatement
OEM	Original equipment manufacturer
PC	Personal computer
PCAOB	Public Company Accounting Oversight Board
PE	Price-to-earnings ratio
PIRC	Pensions & Investment Research Consultants, Ltd,
PSLRA	Private Securities Litigation Reform Act
PSG	Personal Systems Group, a division of Hewlett-Packard
S&M	Autonomy's Sales and Marketing
SaaS	Software as a service, <i>i.e.</i> , providing users with computer applications via the internet as opposed to installing the software on their computers
TTM	Trailing twelve months
VAR	Value-added reseller
VSOE	Vendor-specific objective evidence
y-o-y or Y/Y	Year over year

STATEMENT OF ISSUES TO BE DECIDED

1. Whether Lead Plaintiff's Consolidated Complaint for Violation of the Federal Securities Laws ("Complaint") alleges facts giving rise to a strong inference that Defendants intentionally *or* with deliberate recklessness made materially false and misleading statements and/or omissions – an inference that is at least as compelling as Defendants' rote inference that they "acted in the utmost good faith."¹ See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007) (Ginsburg, J.); *In re VeriFone Holdings, Inc. Sec. Litig.*, 704 F.3d 694 (9th Cir. 2012).

2. Whether the false and misleading statements of present fact alleged in the Complaint qualify as "forward looking" statements and, if so, whether such statements were accompanied by "meaningful" cautionary language. See *No. 84 Emp'r-Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp.*, 320 F.3d 920, 936-37 (9th Cir. 2003); see §IV.B., *infra*.

3. Whether HP's Class Period statements about HP's Autonomy acquisition and integration were rendered misleading when made by the simultaneous failure to disclose that: (i) in September 2011, Defendants Whitman and Lane sought to rescind HP's offer to acquire Autonomy (§§69, 73, 102); (ii) Whitman and Lesjak were alerted, "as early as December 2011[,] to significant problems with the integration of Autonomy into HP that were negatively impacting its performance" (§102); (iii) in May 2012, Whitman learned from a "senior member of Autonomy's leadership team" that Autonomy was engaging in improper accounting practices (§§80, 84, 88, 152); and (iv) HP's Autonomy reported goodwill and acquired intangible assets

¹ Docket ("Dkt.") No. 139 at 1. For purposes of this opposition: "Plaintiff" refers to the Lead Plaintiff PGGM Vermogensbeheer B.V. and the putative Class; "Defendants" refers to Hewlett-Packard Company ("HP" or the "Company"), and "Individual Defendants" Margaret C. Whitman (HP's current CEO), Léo Apotheker (HP's former CEO), Catherine A. Lesjak (HP's current CFO), Michael R. Lynch (Autonomy Corporation plc's ("Autonomy") founder and HP's Class Period Executive Officer), Shane V. Robison (HP's former Executive Vice President and Chief Strategy and Technology Officer), Raymond J. Lane (former Executive Chairman of the Board of Directors ("Board")), and James T. Murrin (HP's Class Period Principal Accounting Officer). The "Class Period" is August 19, 2011 to November 20, 2012, inclusive. "§" citations are to the Complaint and unless otherwise noted, all emphasis is added and internal citations and footnotes are omitted.

were materially overstated, and its impairments were materially understated, in HP's Class Period filings with the Securities and Exchange Commission ("SEC") (¶¶149-62). *See Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1322 (2011) (Sotomayor, J.); *Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 987 (9th Cir. 2008); *see* §IV.C., *infra*.

4. Whether the Complaint alleges sufficient facts showing that all of the Individual Defendants, as HP's top executive directors and officers, possessed the power to direct the management and policies of HP. *See Howard v. Everex Sys.*, 228 F.3d 1057, 1064-65 (9th Cir. 2000); *see* §IV.H., *infra*.

5. Whether Defendant Lynch's scienter can and should be imputed to HP under the doctrine of *respondeat superior*. *See Curry v. Hansen Med., Inc.*, 2012 U.S. Dist. LEXIS 112449, at *35-36 (N.D. Cal. 2012) (Wilken, C.J.); *see* §IV.D., *infra*.

6. Whether Plaintiff was required to allege stock sales to successfully plead the Individual Defendants' various motives to mislead investors. *See Am. W. Holding*, 320 F.3d at 944 ("Scienter can be established even if the officers who made the misleading statements did not sell stock during the class period.").

SUMMARY OF ARGUMENT

Defendants have filed nearly 120 pages of motion to dismiss briefing claiming that the Complaint fails to allege a case of false and misleading statements – or any other cause of action for that matter. Of course, they do so largely by ignoring the Complaint's allegations and offering their own version of events, one where they were all – save Defendant Lynch – mere victims of the grave misconduct Defendant Whitman publicly accused him of on November 20, 2012. ¶¶5-8, 84-85, 87. Defendants waste much time misstating the pleading standards and then suggest that the Complaint does not contain any allegations to meet those standards. Rather than identifying a single pleading defect in the Complaint, however, Defendants seek to recast Plaintiff's allegations to create the false impression that Plaintiff's theory is akin to a "suicide mission" by the Individual Defendants to pay \$11 billion for a fraudulent asset.²

² Dkt. No. 133 at 10; Dkt. No. 127 at 2, 10.

1 Specifically, Defendant Whitman suggests that the “Complaint appears to be premised on
2 the bizarre and counterintuitive theory that Ms. Whitman...[was] aware of Autonomy’s fraud at
3 the time of the acquisition and hid it from the market for several quarters for no particular reason.
4 They then *voluntarily* disclosed the very facts that the Complaint alleges they worked so hard to
5 conceal. This theory makes no sense.” Dkt. No. 139 at 1. But that’s not what the Complaint
6 alleges. As to Defendant Whitman, the Complaint cogently alleges that she, along with the rest
7 of HP’s Board, was “just too exhausted” to oversee Apotheker’s, Lane’s and Robison’s reckless
8 abandon to acquire Autonomy in the period before HP’s August 18, 2011 announcement. ¶¶6,
9 26. Despite the Board’s now admitted lack of oversight before the announcement, she voted, as a
10 member of HP’s Board, to authorize the deal. ¶¶6, 89, 92.

11 The Complaint then alleges that almost immediately after HP announced its offer, and
12 Defendant Whitman was selected to replace Defendant Apotheker as CEO, she learned, in her
13 words, about “potential issues at Autonomy,” including that Autonomy had been “aggressive in
14 its accounting.” ¶¶73, 89. But by then, HP’s options were limited by the U.K. City Code on
15 Takeovers and Mergers (“City Code”) which mandated that HP demonstrate circumstances
16 affecting Autonomy which HP could not have reasonably foreseen at the time of HP’s August 18,
17 2011 announcement in order to withdraw its offer. ¶¶69-73. Indeed, according to Autonomy’s
18 own U.K. lawyers, the “[f]ailure to identify a specific liability of the target group in the course of
19 due diligence *before* the offer is made would not normally provide grounds on which
20 subsequently to withdraw an offer.”³ Given the numerous red flags about Autonomy before the
21 offer was announced (¶¶16-25), and immediately thereafter (¶¶45-49, 60-61, 67), Plaintiff alleges
22 that HP was legally foreclosed from satisfying the City Code’s mandates. ¶72. Nor does the
23 Complaint allege that Defendant Whitman “voluntarily” disclosed Autonomy’s misconduct. It
24 alleges that a *whistleblower* – “a senior member of Autonomy’s leadership team” – forced her
25 hand. ¶¶7, 80-83, 152. Even then, she waited six full months to make the disclosure while
26 simultaneously making positive statements about Autonomy. ¶¶80, 84, 100, 177, 191-94.

27 ³ See Declaration of Ramzi Abadou in Support of Lead Plaintiff’s Omnibus Memorandum
28 of Law in Opposition to Defendants’ Motion to Dismiss (“Abadou Decl.”), Exhibit (“Ex.”) A

1 HP's effort to recast Plaintiff's allegation about the May 2012 whistleblower into the
2 proposition that "anytime *someone* makes allegations, *everyone* who learns about those
3 allegations has knowledge of fraud" is not the least bit instructive. Dkt. No. 133 at 22. The
4 whistleblower wasn't just "anyone" at HP; the Complaint alleges that he was a "senior member
5 of Autonomy's U.S. leadership team," who told HP's General Counsel and CEO Whitman.
6 ¶152. This Court's ruling in *In re Yahoo! Inc. Sec. Litig.*, 2012 U.S. Dist. LEXIS 113036 (N.D.
7 Cal. 2012) does not in any way undermine this alleged disclosure failure because, unlike the
8 defendants in *Yahoo!*, here, Defendants Whitman and Lesjak *did* speak – specifically and
9 repeatedly – about Autonomy after the May 2012 whistleblower accused Autonomy's
10 management of wrongdoing.⁴ See ¶80; *Matrixx*, 131 S. Ct. at 1322 ("companies can control what
11 they have to disclose...by controlling what they say to the market").

12 Defendants' efforts to mischaracterize the Complaint notwithstanding, Plaintiff alleges
13 several categories of actionable misstatements and omissions during the Class Period. First, the
14 Complaint alleges that Defendants Apotheker, Whitman, Lynch, Lane and Robison misled
15 investors about HP's Autonomy due diligence and valuation after they announced the offer on
16 August 18, 2011. ¶¶58, 163-64, 168-78. In September 2011, for instance, Defendant Apotheker
17 represented that HP: (i) had applied a "very conservative" and "rigorous" due diligence process
18 in evaluating Autonomy; (ii) ran "an extremely tight and very professional due diligence
19 process;" and (iii) "paid a very fair price for Autonomy." ¶¶58, 172; see *In re Heckmann Corp.*
20 *Sec. Litig.*, 869 F. Supp. 2d 519, 530-32, 540 (D. Del. 2011). Apotheker, who now claims that
21 these statements were mere "puffery," was fired as HP's CEO only a week after making these
22 misleading statements. And while the Complaint provides painstaking detail describing how and
23 why these statements were deliberately reckless when made (¶¶165, 173, 175-76), one need look
24 no further than HP's own counsel's prior statements to conclude that HP's Autonomy due
25

26 ⁴ Moreover, this is not a "duty to disclose" or "duty to update" case like *Yahoo!* where
27 defendants were able to argue, on the facts alleged there, "that the statement [at issue] is silent as
28 to Alipay, and thus, no duty to disclose arises." *Id.* at *24. Here, again, after the whistleblower
came forward in May 2012, Defendants made specific, repeated statements about Autonomy.

1 diligence was not the least bit effective.⁵ In March 2013, *prior* to being retained by HP for this
2 litigation, Wachtell, Lipton, Rosen & Katz publicly commented (in a client marketing report, no
3 less) that the “acquisition of Autonomy by Hewlett-Packard and subsequent \$8.8 billion write-
4 down...*underscore[s]* the importance of *effective* due diligence in the cross-border acquisition
5 context.”⁶ That’s precisely what the Complaint alleges. ¶¶70-73.

6 Defendant Robison asserts, by contrast, that “HP’s decision not to undertake a full-blown
7 forensic examination during due diligence of an audited public company does not provide a
8 compelling inference of scienter.” Dkt. No. 142 at 6. The primary issue here, however, is not
9 whether HP’s due diligence itself was severely reckless but, rather, whether Defendants’
10 statements *about* HP’s Autonomy due diligence were severely reckless when made.⁷ In other
11 words, “Defendants’ argument that they lacked scienter because they were unaware of the []
12 fraud quite misses the point. The issue here is not what the defendants knew about the [] fraud,
13 but what they knew about their own due diligence process when they made allegedly false
14 representations [] about that process.”⁸ And, when weighed against the numerous red flags the
15 Complaint specifically alleges were raised about Autonomy before and immediately after the
16 acquisition was announced on August 18, 2011 (and its steep \$11 billion price tag), “HP’s
17 decision not to undertake a full-blown” examination of Autonomy before it made its offer was
18 anything but “extremely tight” or “rigorous.” It was reckless. Defendant Robison’s continued
19 inability to appreciate this fact is why Defendant Whitman had him fired for his role in leading
20 HP’s failed Autonomy due diligence. ¶86.

21 Second, the Complaint alleges that, following the market’s overwhelmingly negative
22 response to HP’s August 18, 2011 announcement, Defendants Lane and Whitman tried to rescind
23

24 ⁵ See *Freudenberg v. E*Trade Fin. Corp.*, 712 F. Supp. 2d 171, 193 (S.D.N.Y. 2010)
25 (“minimal due diligence...alleged to establish the falsity of Defendants’ assurances”).

26 ⁶ See Abadou Decl., Ex. B.

27 ⁷ Defendants Apotheker, Lane and Whitman made such statements as referenced in ¶¶58,
28 172, 174-78.

⁸ See *Schwarz v. Thinkstrategy Capital Mgmt. LLC*, 797 F. Supp. 2d 439, 444-45 (S.D.N.Y. 2011).

1 the offer. ¶¶68-73. The Complaint describes when, how and why they were unable to do so. *Id.*
2 Again, HP’s own counsel here has previously (and correctly) observed on our facts that the
3 “[w]holesale application of the acquiror’s [HP’s] domestic due diligence standards to the target’s
4 [Autonomy’s] jurisdiction *can...result in missing a problem.*” Abadou Decl., Ex. B. Similarly,
5 here, the Complaint alleges that: (i) HP’s due diligence failed to fully recognize the harsh
6 limitations imposed by the City Code for acquisitions; (ii) recklessly turned a “blind eye” to
7 Autonomy’s potential issues; and (iii) how those failures precluded HP from withdrawing its
8 offer between the time of the announcement (August 18, 2011) and closing (October 3, 2011).
9 ¶¶16-25, 68-73; *VeriFone*, 704 F.3d at 708. Defendants Whitman and Lane’s concealment of
10 HP’s failed effort to withdraw the offer is actionable.⁹

11 Relatedly, only a week after HP announced the offer, the Complaint alleges that
12 Defendant Lesjak canceled an important road show appearance meant to defend the terms of
13 HP’s Autonomy deal. ¶47. Lesjak does not dispute the accuracy of Plaintiff’s allegation.
14 Rather, she claims that her “absence from the road show hardly is surprising given her opposition
15 to the Autonomy transaction.” Dkt. No. 136 at 3, n.2. That might be true for whatever it’s worth
16 but, rather than tell investors about “her opposition to the Autonomy transaction,” or say nothing
17 at all, she promoted it by misleadingly representing that she was “pleased with the Autonomy
18 acquisition,” while simultaneously certifying the Company’s reported Autonomy goodwill in
19 HP’s quarterly reports on Forms 10-Q filed with the SEC for the first three quarters of 2012.
20 ¶¶149, 152, 155, 185, 187-88. In reality, Lesjak was not “pleased.” As she previously told the
21 full HP Board in July 2011, Defendant Lesjak believed that Autonomy was, among other things,
22 “not in the best interests of the company” and “too expensive.” ¶32.

23 Third, the Complaint alleges that after the transaction closed on October 3, 2011, HP’s
24 Worldwide Director of Software Revenue Recognition, Paul Curtis, confirmed internally at HP
25 what numerous market observers had long suspected – namely, that Autonomy *had* artificially
26 inflated its growth and future prospects *via* improper revenue recognition practices. ¶¶74-79, 100,

27 ⁹ See generally *Nieman v. Duke Energy Corp.*, 2013 U.S. Dist. LEXIS 110693, at *20-21,
28 *25-26 (W.D.N.C. 2013).

1 134-41. HP's own 2012 Annual Report on Form 10-K later admitted as much by (belatedly)
2 revealing that "subsequent to the Autonomy purchase price allocation period, which concluded *in*
3 *the first quarter of fiscal 2012* [January 31, 2012]...*HP identified certain indicators of*
4 *impairment.*" ¶147. Despite this discovery, throughout the Class Period, Defendants Whitman
5 and Lesjak represented that the Company's quarterly reports "contain[ed] all adjustments,
6 including normal recurring adjustments, necessary to present fairly HP's financial position."
7 ¶¶149, 152, 155. Defendants' limited response to these detailed and damning allegations is
8 telling.

9 Fourth, the Complaint alleges that, in February 2012, Defendants Whitman and Lesjak
10 misled HP's shareholders about Autonomy's seamless integration into HP when they knew,
11 contemporaneously, that the Company's integration efforts were suffering from "significant
12 problems...that were negatively impacting [Autonomy's] performance." ¶¶102, 185. The source
13 for this allegation (and quotation) is HP's very own Class Period Executive Officer, and direct
14 Whitman report (¶109), Defendant Lynch who later accused Defendants Whitman and Lesjak of
15 failing to disclose this "material" information. ¶100. Finally, the Complaint alleges that HP's
16 surreptitious efforts to unwind Autonomy's accounting irregularities were thwarted by a "senior
17 member" of HP/Autonomy's "leadership team," who blew the whistle on HP/Autonomy's
18 misconduct in May 2012, and that HP and Defendants Whitman, Lane, Lesjak and Murrin failed
19 to disclose this material development to shareholders until November 2012.¹⁰ ¶¶80-83.

20 In addition to adequately pleading actionable false statements and omissions, the
21 Complaint also pleads strong facts supporting Defendants' scienter. Defendants' suggestion that
22 the "complaint does not allege facts showing, for example, that [] *insiders* had advised [Mr.
23 Apotheker, Ms. Whitman or Mr. Lane] that the price for Autonomy was not a 'fair price' or
24 'market price'" is nonsense. Dkt. No. 133 at 8. At a July 2011 Board meeting described with
25 excruciating detail in the Complaint, for instance, Plaintiff alleges that HP CFO Lesjak (*i.e.*, an
26 "*insider*") told Defendants Lane, Apotheker and Whitman that, even at approximately \$6 billion,

27 ¹⁰ See *Berson*, 527 F.3d at 987 (Once defendants choose to speak, they must speak
28 truthfully.).

1 Autonomy was “too expensive.” ¶32. Although the Complaint describes this meeting in great
2 detail, including the date of the meeting, who attended and what was said by specific persons
3 there (*id.*), HP’s dismissal papers nevertheless inaccurately suggest that the “complaint offers
4 no...descriptions of meetings, and nothing else” to support its claim that HP’s executives
5 misrepresented the “‘fairness’ of the price” HP paid to acquire Autonomy. Dkt. No. 133 at 1-2.

6 In addition, and despite the cogent allegations of his motives (¶¶13, 26-29, 31-33, 36, 38,
7 44-46, 58), Apotheker’s dismissal motion claims that “Plaintiff never explains how an alleged
8 desire to ‘transform’ HP could possibly have prompted Mr. Apotheker (or anyone else) to pursue
9 the purchase of an allegedly fraudulent enterprise.”¹¹ Dkt. No. 127 at 5. In fairness, the
10 Complaint painstakingly depicts Apotheker’s willingness to “suspend disbelief” about
11 Autonomy’s possible impairments to defend his credibility with the market and rush HP’s due
12 diligence to avoid a leak about the deal. ¶¶12-13, 34-35. The allegations of Defendants’
13 Whitman’s scienter, in her role as HP’s CEO, are also particularly compelling. On November 20,
14 2012, for instance, the Complaint alleges that Defendant Whitman was pressed to publicly admit
15 that she **knew** about Autonomy’s impairments soon after the offer was announced which
16 motivated her to try to withdraw the offer – “what I do **know** [Whitman said] **is that after we**
17 **announced the acquisition** [on August 18, 2011] there were a number of blogs that came to the
18 fore about potential issues at Autonomy.” ¶¶68-73, 89, 92.

19 Later the same day, Defendant Whitman again was forced to concede that HP had
20 learned, prior to the expiration of the offering period, that “bloggers and some financial analysts
21 had claimed in the past that **Autonomy was aggressive in its accounting**.” ¶73. In a subsequent
22 statement to the *San Jose Mercury News* in December 2012, HP again confirmed “**that it had**
23 **been aware of apprehensions expressed about Autonomy**” after the offer was announced. ¶96.
24 The Complaint then cogently alleges that Defendant Whitman’s known apprehensions about
25

26 ¹¹ Apotheker made a similar argument in *Gammel v. Hewlett-Packard Co.*, where he was
27 recently found to have acted with scienter in making misleading statements related to HP’s failed
28 Palm, Inc. acquisition. See 2013 U.S. Dist. LEXIS 68026, at *58-61 (C.D. Cal. 2013)
 (“Apotheker [] knew [his] June and July [2011] statements...were false or deliberately
 reckless.”).

1 Autonomy’s accounting practices *after* the offer was announced motivated her failed attempt to
2 rescind the offer under the City Code – a fact which, again, she concealed from HP’s
3 shareholders during the Class Period. ¶¶68-69, 73. In fact, Defendants Whitman and Lesjak
4 actually *promoted* Autonomy’s prospects during this period. ¶¶76, 177, 185. After replacing
5 Defendant Apotheker as HP CEO on September 22, 2011, for instance, Defendant Whitman
6 falsely represented that she was “supportive of the actions [to acquire Autonomy] that were
7 announced on August 18 [2011]” and that “from what I know now, I think the [Autonomy]
8 strategy is right, the initiatives that we undertook on August 18 [2011] are right.” ¶177. In truth,
9 Whitman fired Apotheker because she loathed his “transformational” deal and was then actively
10 looking for a way out of it.

11 While Defendants half-heartedly raise other arguments – such as whether Defendants’
12 false statements constitute “puffery,” or whether Defendant Murrin possessed sufficient control
13 over the primary violators – these merit little more than passing mention. Predominantly,
14 Defendants raise questions of fact that cannot be decided here. And in those rare instances where
15 such arguments could be decided on a motion to dismiss, they utterly fail to carry their burden.
16 For all these reasons, Defendants’ motions to dismiss should be denied.

1
2 *Michael R. Lynch* (November 2012)
3 “Why did HP senior management apparently wait six months to inform its
4 shareholders of the possibility of a material event related to Autonomy?” (¶100)

5
6 *Margaret C. Whitman* (November 2012)
7 “I regret that I voted for this deal.” (¶89)

8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 **I. INTRODUCTION¹**

The Complaint states actionable claims against all of the Defendants. They have no serious response. Where they actually do respond, Defendants either ignore crucial facts, misconstrue the law or both. The Complaint centers on HP’s now-admittedly failed \$11 billion acquisition of Autonomy on October 3, 2011 – a British U.K. software technology company founded by HP Class Period Executive Officer, Defendant Lynch – that HP was later forced to announce an \$8.8 billion write down for on November 20, 2012. Many of Plaintiff’s core allegations flow from Defendants’ own ill-advised public statements, “open letters,” leaks to the press and other public recriminations. Indeed, to date, Defendant Lynch *still* maintains an active blog about this matter that, in his words, “provides relevant information pertaining to the accusations made by Hewlett Packard (HP) on 20 November 2012 of financial impropriety at Autonomy. The former management team of Autonomy strongly rejects the accusations made by HP.”² The corporate dysfunction depicted alongside the misconduct alleged in the Complaint is staggering.

Speaking for all of the Defendants, Whitman’s dismissal motion claims that the “only cogent inference to be drawn from the allegations [in the Complaint] is that Ms. Whitman *and the other defendants* acted in the utmost good faith.”³ Incredible. Less than a year ago, on November 20, 2012, Defendant Whitman bluntly accused Defendant Lynch of engaging in “serious accounting improprieties, disclosure failures, and outright misrepresentations,” and concluded that Defendants Apotheker and Robison, whom Defendant Whitman had fired for their

¹ Plaintiff objects to the following exhibits proffered by Defendant Lynch because they are offered for the truth of the matters asserted therein: Dkt. No. 126, Exs. 1-2.

² www.AutonomyAccounts.org

³ Dkt. No. 139 at 1.

1 role in HP's botched Autonomy acquisition, should be held "responsible." ¶¶5, 84-86, 92, 217.
2 There is nothing remotely compelling about her current proffered inference of "good faith"
3 mismanagement. Indeed, "[n]egligence can always be offered as an explanation for fraudulent
4 behavior, but here it does not create an inference that is more compelling than plaintiff[']s."⁴ In
5 turn, HP suggests that the Complaint should be dismissed because it "recast[s] the victim – HP –
6 as the perpetrator."⁵ This takes chutzpah. Again, on November 20, 2012, Defendant Whitman
7 squarely cast HP's *shareholders* as the victims here and, accordingly, represented that she would
8 "seek redress against various parties in the appropriate civil courts to recoup what we can for our
9 shareholders." ¶84. Now, almost a year after accusing Defendant Lynch of engaging in fraud,
10 Defendant Whitman has yet to deliver on her empty campaign-style assurance. Whitman would
11 probably prefer to forget that her former colleague, Defendant Lynch, personally pocketed \$800
12 million (in cash) from his transaction with HP. ¶¶45, 84 n.30, 100.

13 Whitman's current claims notwithstanding, the Complaint alleges that Defendants
14 Apotheker and Lynch publicly announced HP's \$11 billion offer to acquire Autonomy on August
15 18, 2011, recklessly extolling Autonomy's record high margins and historical financial
16 performance.⁶ The following day, and in response to the announcement, HP's share price
17 unusually fell 20% on heavy trading volume. Analysts immediately described HP's offer as
18 "value-destroying" and "expensive," while others found that HP was "massively overpaying" for
19 Autonomy. ¶46. The Complaint then alleges that the almost universally negative reaction to the
20 announcement confirmed to Defendants that the red flags that had been previously raised about
21 Autonomy prior to the announcement – including those raised by Autonomy's *own* former head
22 of investor relations (Marc Geall) and HP's *own* CFO (Cathie Lesjak) – were recklessly ignored
23 by HP, Apotheker, Lane and Robison during HP's three week due diligence. ¶¶24, 32, 42, 45-46,
24 58, 209.

25
26 ⁴ *Norfolk Cnty. Ret. Sys. v. Ustian*, 2009 U.S. Dist. LEXIS 65731, at *35 (N.D. Ill. 2009).

27 ⁵ Dkt No. 133 at 1.

28 ⁶ Despite his company's Joint Press Release with HP, Defendant Lynch suggests that he did not make any statements during the Class Period. See §IV.E., *infra*; Abadou Decl., Ex. C.

1 Only a week after the announcement, HP fired Defendants Apotheker and Robison.⁷ In
2 Defendant Whitman’s blunt words at the time, “the two people that should have been held
3 responsible [for HP’s Autonomy acquisition] are gone.” ¶86. Similarly, following the
4 announcement, but unbeknownst to investors, the Complaint asserts that, in September 2011,
5 Whitman and Lane sought to rescind the offer before it closed in October 2011. ¶68. The
6 Complaint specifically alleges why they were unable to do so under the City Code and who they
7 specifically asked about withdrawing. ¶¶69-73. The Complaint then alleges that the stop-gap
8 measure for HP’s Autonomy fiasco, what was supposed to have been HP’s due diligence, was
9 reckless at best. Indeed, had HP done even the most cursory due diligence, the Complaint alleges
10 that HP could easily have discovered the Autonomy emails entered into evidence in the *Briody*
11 matter demonstrating that Autonomy was engaging in a fraud obvious enough to detect through
12 effective due diligence prior to HP’s August 18, 2011 announcement. ¶¶62-67.

13 The *Briody* matter may only involve one Autonomy employee in a case involving only
14 \$96,000 from HP’s current vantage point, but had HP done even the most cursory due diligence,
15 the *Briody* matter (which was filed before the offer period closed on October 3, 2011) could have
16 saved HP and its shareholders an \$8.8 billion write-down and billions in dollars of market losses.
17 ¶¶62-66. Moreover, had the Company taken the time to so much as interview Autonomy’s
18 customers and sales personnel to determine if the rumors about Autonomy’s artificially bloated
19 revenues were true, it would and could have easily discovered what CW1 relayed to Plaintiffs
20 about Autonomy’s improper conduct in the period before the Class Period. ¶¶50-56. Indeed,
21 according to HP’s own auditor’s (KPMG LLP (“KPMG”)) **August 9, 2011** assessment about
22 HP’s Autonomy due diligence, KPMG warned the Individual Defendants that HP’s “[d]ue
23 diligence comprised *telephone discussions* with [Autonomy] management and access to *very*
24 *limited* proprietary financial and tax information. The majority of findings and observations are
25 based on *oral representations* from [Autonomy] management and reading published financial
26

27 ⁷ See *In re UTStarcom, Inc. Sec. Litig.*, 617 F. Supp. 2d 964, 976 (N.D. Cal. 2009); *In re*
28 *McKesson HBOC, Inc., Sec. Litig.*, 126 F. Supp. 2d 1248, 1275 n.16 (N.D. Cal. 2000); *In re*
Adaptive Broadband Sec. Litig., 2002 U.S. Dist. LEXIS 5887, at *42-43 (N.D. Cal. 2002).

1 information.”⁸ KPMG also informed HP that “*very limited information*” was provided to it by
2 Autonomy during its due diligence.⁹

3 After Defendants Whitman and Lane tried, but failed, to withdraw HP’s Autonomy offer,
4 the transaction closed on October 3, 2011, at which time Autonomy immediately began reporting
5 out of HP’s Software Segment. The Complaint alleges that, between October 2011 and
6 December 2011, Whitman, Lane and Lesjak learned first-hand what many sophisticated market
7 observers had long suspected about Autonomy, and what HP’s willy-nilly due diligence efforts
8 had overlooked – namely, that Autonomy was engaged in serious accounting irregularities and,
9 as a consequence, was wildly overvalued at the time of the acquisition. Rather than disclose that
10 HP had purchased yet *another* troubled asset, and take a third damaging and humiliating multi-
11 billion dollar write-down in the span of a year (¶¶27, 71, 73), the Complaint alleges that HP
12 began to surreptitiously unwind Autonomy’s improper accounting practices. ¶¶74-79.
13 Defendants’ repeated references to the absence of stock sales to attack these cogent motive
14 allegations are not instructive as they “neither negate[] scienter, nor support[] plaintiff’s other
15 scienter allegations.”¹⁰ In other words, they amount to zero. As the Hon. Richard Seeborg
16 recently observed in *SunPower*:¹¹

17 [T]he motive of someone associated with a company to have that company
18 succeed, live another day is a pretty powerful motive. I mean, we see it all the
19 time. You know, to disregard the idea that because they don’t have any personal
20 trading interest that it’s fanciful to suggest that there’s any motive out there to
21 enhance the corporate – the results of the company [] I mean I don’t find that
troubling suggestion that that would be the motive.¹²

22 ⁸ See Abadou Decl., Ex. D.

23 ⁹ *Id.* This is not a case like *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1001
24 (9th Cir. 2009), where “the alleged misrepresentations d[id] not concern especially prominent
25 facts” or the misrepresentations were “largely definitional” and thus “would not be immediately
obvious to corporate management.”

26 ¹⁰ *In re Diamond Foods, Inc.*, 2012 U.S. Dist. LEXIS 170704, at *23 (N.D. Cal. 2012)
(Alsup, J.).

27 ¹¹ Neither is a restatement necessary to plead scienter. See *In re Levi Strauss & Co. Sec.*
Litig., 527 F. Supp. 2d 965, 987-88 (N.D. Cal. 2007).

28 ¹² Abadou Decl., Ex. E at 25:9-20.

1 The Complaint then describes how the scheme to quietly unwind Autonomy’s fraudulent
2 accounting practices was upended by a “senior member of Autonomy’s leadership team” who
3 blew the whistle on Autonomy’s improper revenue recognition practices to HP’s general counsel,
4 John Schultz, and Defendant Whitman in May 2012. ¶¶80, 84. At roughly the same time,
5 Defendant Lynch was suspiciously removed from HP. ¶80. A full six months later, on
6 November 20, 2012, Defendant Whitman announced HP’s massive \$8.8 billion Autonomy write-
7 down and simultaneously accused Defendant Lynch of “serious accounting improprieties,
8 disclosure failures and outright misrepresentations.” ¶¶5, 8, 84, 88, 217. In the interim, however,
9 Defendants Whitman and Lesjak made several actionable misleading statements about HP’s
10 Autonomy unit. ¶¶76, 80, 111, 127, 134, 142-43, 145, 149-58, 163-64, 168-69, 171-72, 177-80,
11 182, 184-85, 187-89, 191, 194, 196-97, 199-202, 204-06. On June 5, 2012, for instance, a month
12 after the May 2012 whistleblower came forward, Whitman responded to a specific question about
13 Lynch’s ouster, stating that “*for many entrepreneurs [i.e., Lynch], processes and discipline are*
14 *dirty words*, and you have to have those things, especially within the context of HP. I know
15 exactly how this world [works],” and that she wanted to “make sure that [Autonomy] gets
16 integrated into the rest of HP *in a good way*.”¹³ While walking right up to the line, Defendant
17 Whitman deliberately concealed that she had earlier learned from a “senior member of
18 Autonomy’s leadership team” in May 2012 that Defendant Lynch had been engaging in serious
19 accounting improprieties and disclosure failures. ¶¶81, 84. This is actionable misconduct under
20 §10(b) and Rule 10b-5.

21 By November 20, 2012, the Company had to finally admit what all of the Defendants,
22 except perhaps Defendants Lesjak and Lynch, were at least reckless in not knowing since HP’s
23 July 2011 Board meeting – namely, that “Autonomy was *substantially overvalued* at the time of
24 its acquisition.” ¶85. Defendants’ subsequent explanation that Defendant Lynch’s misconduct
25 had “severely impacted HP management’s ability to fairly value Autonomy at the time of the
26

27 ¹³ The following month, in July 2012, HP deputy general counsel Paul T. Porrini, who led
28 HP’s in-house legal team for the Autonomy acquisition, and signed the August 18, 2011 press
release, abruptly resigned from HP. ¶81.

1 deal” ignores that the Complaint’s allegations that HP’s own CFO (Defendant Lesjak) had earlier
2 warned the full HP Board – including Defendants Whitman, Lane and Apotheker – that, at \$6
3 billion Autonomy was “too expensive.” As did others. ¶¶45-46, 57, 60-61. In the end, and as set
4 forth throughout herein, Defendants’ dismissal motions do little more than “kick up dust” and
5 ought be denied.¹⁴

6 **II. STATEMENT OF FACTS**

7 **A. New HP CEO Apotheker Promises to Quickly Transform HP**

8 In March 2011, after only four months in his role as HP’s CEO, former German software
9 executive Defendant Apotheker announced his breathtaking new strategy to “transform” HP from
10 a low-margin computer hardware producer into a high-margin corporate software and services
11 provider.¹⁵ ¶27. The Complaint alleges that Defendant Apotheker announced this strategy
12 because he knew that HP’s core hardware Personal Systems Group was struggling to generate
13 revenue growth. *Id.* In order to deliver on his plan, the Complaint alleges that Defendant
14 Apotheker began to pursue what he described as a single “transformative” corporate acquisition
15 that would firmly and quickly position the Company in the high-margin software and software
16 services industries. ¶28.

17 The market was highly skeptical of Apotheker’s strategy and, at HP’s Summit Press
18 Conference on March 14, 2011, analysts asked him pointed questions about his plans. *Id.* (“You
19 are way, way behind here....You have given us platitudes about launching a public cloud but you
20 have any details?”); (“Do you feel – will it be particularly – do you feel you will have a hard time
21 or will it be a challenge to compete...?”). Ultimately, Apotheker responded that he found their
22 questions laughable. *Id.* (Apotheker: “I found it amusing.”); (Apotheker: “I find this amusing.”);
23 (Apotheker: “I don’t have the feeling I gave you platitudes...Why don’t we leave it at
24 that?...There is another platitude for you.”). Following the investor conference, the Complaint
25 describes how a chastened Apotheker doubled-down on his promise to “transform” HP by fiscal
26

27 ¹⁴ *In re Stellant, Inc. Sec. Litig.*, 326 F. Supp. 2d 970, 975 n.1 (D. Minn. 2004).

28 ¹⁵ A majority of HP’s Board did not meet Apotheker before unanimously voting to hire him.
¶26.

1 year ending October 31, 2011. ¶29. In addition, by the time he announced his strategy shift, the
2 Complaint also alleges that Apotheker had become frustrated by HP's scuttling of his effort to
3 acquire Comverse Technology Inc. ("Comverse") – a high-tech software company, but one
4 emerging from a recent accounting backdating scandal. ¶¶29, 37.

5 Autonomy came to Apotheker's attention as a potential acquisition target *via* Frank
6 Quattrone's Qatalyst Partners, who brokered a meeting between Lynch, Lane and Apotheker at
7 HP's Palo Alto headquarters in April 2011. ¶¶30-31. Immediately following the meeting, the
8 Complaint alleges that Defendant Apotheker told Defendant Lane that he wanted to buy
9 Autonomy. ¶31. Defendants do not dispute the accuracy of these facts. The following month, in
10 May 2011, the Complaint describes how HP's Board approved Apotheker's proposal to look
11 deeper into acquiring Autonomy, code naming the plan, "Project Tesla." *Id.* Despite the
12 questions about Autonomy's accounting issues, Autonomy presented Apotheker with a
13 seemingly exclusive opportunity – a panacea – by which to quickly improve HP's anemic
14 financial performance and simultaneously deliver on his promise to "transform" HP. *Id.* The
15 Complaint alleges that, by July 2011, Apotheker gave a presentation to the full HP Board – in
16 Defendants Lane, Lesjak and Whitman's presence – on the absolute necessity of HP's acquiring
17 Autonomy, saying "[t]his Company is a burning platform...We're going to have to hold hands
18 and go through this together." ¶32.

19 This was not a "suicide mission" for Apotheker; it was a desperate plea by a desperate
20 new CEO seeking support for an acquisition that he came to believe, however recklessly, would
21 turn HP around. The Complaint alleges that Apotheker was willing to overlook the red flags
22 raised in HP's due diligence about Autonomy's possible revenue recognition practices because
23 of: (i) Autonomy's "technological promise;" (ii) the internal and external challenges to his
24 capacity to "transform" HP; and (iii) the ever-present possibility of a leak dooming his
25 transaction. ¶¶11-13, 16, 27-29, 32-34. Following Apotheker's plea to the Board, and at the same
26 July 2011 meeting, Defendant Lesjak challenged his proposal, stating "I can't support [the
27 Autonomy Acquisition]. I don't think it's a good idea. I don't think we're ready. ***I think it's too***
28 ***expensive.*** I'm putting a line down. ***This is not in the best interests of the company.***" ¶32.

Defendants’ dismissal motions do not dispute that CFO Lesjak made these statements or that her comments put Whitman, Lane and Apotheker (who were all in the same room) on notice that the corporate officer at HP primarily responsible for managing the Company’s financial risks viewed the deal as reckless. ¶¶32-33. Although the Complaint pleads that Lesjak specifically objected to the price of acquiring Autonomy (and when, where and to whom she did so (¶32)), HP’s dismissal papers claim that the “complaint does not allege facts showing, for example, that...insiders had advised [Mr. Apotheker, Ms. Whitman, or Mr. Lane] that the price for Autonomy was not a ‘fair price’ or ‘market price.’” Dkt. No. 133 at 8.

1. HP, Apotheker, Lane and Robison Conduct “Limited” Due Diligence for Autonomy

As set forth above, determined to deliver on his unequivocal promise to transform HP into a high-margin software company, and to do so as quickly as possible to avoid a leak about the deal, the Complaint describes how Apotheker rushed HP’s Autonomy due diligence so as to announce the offer by 3Q11. ¶¶34-39. Moreover, aware that CFO Lesjak and Finance Committee Chair John H. Hammergren vigorously opposed the deal (¶¶32, 37), the Complaint alleges that Apotheker, Lane and Robison circumvented HP’s Board Finance Committee prior to full Board review on August 17, 2011 to avoid added scrutiny of what they knew was a risky transaction. ¶¶37-38. Further, to expedite HP’s due diligence, the Complaint alleges that HP recklessly relied on *Autonomy’s* auditor’s (Deloitte Touche Tohmatsu Limited (“Deloitte”)) historical audits of Autonomy in the U.K. ¶¶36, 40-41.

While HP did engage KPMG for its own due diligence, the Complaint alleges that KPMG was specifically instructed by HP to limit its work to reviewing the prior audits of Autonomy performed by Deloitte in London. ¶36. In fact, after the Class Period, KPMG went on record to confirm that its role on the Autonomy due diligence was only a “*limited engagement*.” *Id.*; see also Abadou Decl., Ex. D. The Complaint further alleges that, over the course of its “limited” due diligence, HP’s due diligence team spoke by telephone with Autonomy’s auditors at Deloitte. ¶39. During the call, Deloitte disclosed that, 18 months earlier, an Autonomy finance executive in London had alleged that improper accounting practices were occurring at Autonomy. *Id.* The

1 Complaint cogently alleges that, in its haste to announce the offer, HP recklessly failed to run this
2 allegation about Autonomy’s impairments to ground. *Id.* HP can quibble here all it wants but,
3 ultimately, it does not deny its knowledge of these facts. Nor can it do so, as the Complaint
4 alleges that KPMG later revealed that *all* of the information KPMG was provided by Deloitte,
5 including allegations of Autonomy’s improper revenue recognition practices, were “*equally*
6 *disclosed to HP.*” *Id.*

7 **2. Apotheker and Lynch Announce the Offer in a Joint Press Release**

8 On August 18, 2011, after its three week “limited” due diligence, HP announced its offer
9 to purchase Autonomy for \$11 billion. The announcement caused the Company’s stock price to
10 fall 20% in a single trading day on massive trading volume. ¶¶34, 44-45. Analysts variously
11 described HP’s offer as “value-destroying” and “expensive,” while others concluded that HP was
12 “*massively overpaying*” for Autonomy and probably “*felt compelled to act*” given Apotheker’s
13 earlier guarantees to “transform” HP. ¶46. On November 30, 2012, a *New York Times* article
14 headlined “From H.P., a Blunder that Seems to Beat All,” reported that a “former Autonomy
15 executive *laughed* this week when I asked if even Autonomy executives thought H.P. had
16 overpaid. ‘Let’s put it this way,’ this person said. ‘H.P. paid a very full price. It was certainly our
17 duty to our [Autonomy] shareholders to say yes.’” ¶45. The Complaint alleges that all of the
18 Defendants were either aware of, or recklessly ignored these and other highly damaging facts.
19 ¶¶16-25, 29-43, 85-87, 91-96, 101, 165-69.

20 In September 2011, U.K. analyst Paul Morland (“Morland”) sent HP’s Investor Relations
21 Department an email warning that “they were making a big mistake” in acquiring Autonomy.
22 ¶67. Defendants claim that it is unclear what “mistake” Morland told HP they were making and
23 that he may simply have expressed disagreement with the acquisition. Dkt. No. 136 at 6; Dkt.
24 No. 133 at 14. Even taking Defendants’ argument as true, however, the e-mail certainly would
25 have alerted them to Morland’s previous published reports on Autonomy, which accused it, *inter*
26 *alia*, of: (i) recognizing hardware revenue as software revenue; (ii) improperly exaggerating its
27 growth rate; (iii) improperly recognizing revenue up front; and (iv) recognizing hosting revenues
28

1 as license revenues – the very practices HP claimed to be stunned by in November 2012.¹⁶ ¶¶19-
2 20, 22.

3 Following the market’s almost universally negative reaction to HP’s announcement, the
4 Complaint alleges that Apotheker recklessly defended the proposed deal. ¶¶58-59. At a
5 September 13, 2011 investor conference, for instance, Apotheker was specifically asked “[w]hat
6 specific steps around due diligence did HP take to investigate any concerns around [Autonomy’s]
7 accounting prior to completing or announcing the transaction.” ¶176. In response, Apotheker
8 misrepresented that HP had applied a “very conservative” and “rigorous” process in evaluating
9 Autonomy, adding that HP ran “an extremely tight and very professional due diligence process.”
10 ¶¶58, 86, 172, 176. Apotheker further misrepresented that HP’s valuation and due diligence had
11 resulted in “a very fair price for Autonomy” – *“just take it from us. We did that analysis at great*
12 *length, in great detail, and we feel that we paid a very fair price for Autonomy. And it will give a*
13 *great return to our shareholders.”* ¶¶58, 172.

14 At the same September 13, 2011 conference, Apotheker also relayed Defendant Lynch’s
15 prior statements that Autonomy “generates 40% margin,” and noted that HP “bring[s] scale,
16 essentially scale and complementarily to that asset only makes it an even more palpable asset for
17 us because it gives us the opportunity to really provide a return very quickly for our
18 shareholders.” ¶171. As referenced in the Complaint, these statements were deliberately
19 reckless when made. ¶¶166-67, 172. In response to a question about the strength
20 HP/Autonomy’s core IDOL OEM platform, the Complaint alleges that Defendant Robison
21 recklessly represented that “[t]here’s *no data* that indicates the core OEM franchise is
22 deteriorating. If you look at the growth for the IDOL platform, it’s growing nicely and will
23 continue.” ¶174. In truth, mounds of publicly-available data existed as early as 2009 clearly
24
25

26 ¹⁶ The fact that Morland may have told CNBC that he was not accusing Autonomy of fraud
27 does nothing to change this analysis. Dkt. No. 134-12; Dkt. No. 133 at 14. Nor does HP’s
28 argument that Morland had no personal knowledge of the accounting fraud. Dkt. No. 133 at 14.
Morland was an industry analyst in the U.K. who closely tracked Autonomy and published
numerous reports questioning its revenue recognition and reported growth. ¶¶17, 19-20, 22, 24.

1 indicating that Autonomy’s core IDOL OEM franchise was “vaporware writ large” and
2 nonexistent. ¶¶24, 61, 89, 93-95.

3 Then, on September 22, 2011, only a week after defending HP’s offer, and before his deal
4 with Autonomy had yet to even *close*, HP fired Apotheker. ¶68. The same day, Defendant
5 Whitman took over as CEO and, during a joint interview with Lane, Lane conceded that
6 Apotheker’s “transformational” strategy had been so reckless that it was no longer even worth
7 mentioning – “*that word has been stricken from our language*, that we’re transforming HP.
8 Because HP is \$120 billion, and so with Autonomy’s enormous success and enormous
9 profitability and synergies that we can gain, we think we can build a heck of the business out of it
10 but *it has nothing to do with transforming*.” ¶¶68, 177. During the same September 22, 2011
11 interview, Lane also stated that, although he wished HP “could have bought it [Autonomy]
12 cheaper, [] *it was market price*.” ¶178. Lane by then either knew, or was reckless in not
13 knowing, that at \$11 billion, Autonomy wasn’t “market” price.¹⁷ ¶¶16-25, 32-42, 45-56, 60-67.
14 Indeed, HP has effectively admitted that Lane’s statement was inaccurate by virtue of their \$8.8
15 billion Autonomy write down. ¶¶84, 217.

16 **B. Defendants Whitman and Lane Seek to Rescind the Offer**

17 The following day, on September 23, 2011, FBN Securities noted that “[i]ncoming CEO
18 Whitman stated that for now she is supportive of the August 18 [2011] decision[] to purchase
19 Autonomy ([]expected to [close] by the end of the year,[])...but she noted that she will be
20 evaluating the[] decision[] closely (implying some reversal possibility, in opinion),” and that
21 “[w]ith Autonomy, there is a contractual commitment, but there is the possibility of a negotiated
22 solution.” ¶178. There was, however, no “possibility of a negotiated solution” given what the
23 Complaint specifically alleges were HP’s draconian foreign contractual obligations to Autonomy
24 under the City Code. ¶¶68-73, 178. The Complaint painstakingly alleges that, by then, Lane had

25 ¹⁷ Two weeks before the offer period closed on October 3, Oracle’s CEO, Larry Ellison,
26 disclosed that Oracle had rejected a proposal to acquire Autonomy for \$6 billion. ¶60. In
27 response, HP’s (soon-to-be) Executive Officer, Defendant Lynch, publicly attacked Ellison’s
28 assertion that he had shopped Autonomy to Oracle. *Id.* On September 28, 2011, Ellison issued a
press release responding to Lynch’s denial called “*Please Buy Autonomy*,” which asserted that
“[e]ither Mr. Lynch has a very poor memory *or he’s lying*.” *Id.*

1 specifically asked HP's financial advisers (Barclays and Perella) whether HP could back out of
2 the deal. ¶73. He was told that U.K. takeover rules made that impossible. *Id.*

3 The Complaint alleges that for HP to successfully invoke a material adverse condition
4 under the City Code, HP was required to demonstrate to the U.K. Takeover Panel that
5 circumstances had arisen affecting Autonomy which HP *could not have reasonably foreseen at*
6 *the time of the announcement* of HP's August 18, 2011 offer. ¶72. Given the numerous,
7 publicly-available red flags about Autonomy that made it reasonably *foreseeable* that Autonomy
8 *was* overvalued and/or engaging in improper accounting practices, the Complaint alleges that HP
9 could not successfully invoke the material adverse condition necessary to withdraw the offer. *Id.*

10 **C. HP Attempts to Quietly Unwind Autonomy's Improper Accounting Practices**

11 Next, the Complaint alleges that, after the offering period closed on October 3, 2011, HP
12 immediately began to claw back commissions paid to Autonomy salespeople that the Company
13 knew were using improper revenue recognition practices. ¶¶74, 182. HP also began to change
14 *how* revenue was recognized and commissions were paid by Autonomy. ¶¶74-75, 77. Then,
15 beginning in October 2011, the Complaint describes how HP began to undertake detailed studies
16 of Autonomy's software revenue recognition practices, and that these studies revealed that
17 Autonomy's management had, in fact, been engaging in improper revenue recognition practices.
18 ¶¶75, 139. Defendant Lynch appeared to confirm that Defendant Whitman knew,
19 contemporaneously, about Autonomy's aggressive accounting practices when, in an "open
20 letter," he rhetorically asked Defendant Whitman to "explain how such issues could *possibly*
21 have gone undetected during...HP's financial oversight of Autonomy for a year from acquisition
22 until October 2012 (a period during which all of the Autonomy finance reported to HP's CFO
23 Cathie Lesjak)." ¶100. In the same "open letter," Defendant Lynch also provocatively asked
24 whether "Ms Whitman and Ms Lesjak [were] aware that Paul Curtis (HP's Worldwide Director
25 of Software Revenue Recognition)...undertook in December 2011 detailed studies of
26 Autonomy's software revenue recognition with a view to optimising for US GAAP?" ¶100.

27 Either Defendants knew that Mr. Curtis had discovered and was "optimizing," or were
28 severely reckless in not knowing that he had discovered and was "optimizing," Autonomy's

1 improper bogus revenue recognition practices as of January 2012. ¶¶134-38. The Complaint
2 goes even further by specifically alleging how: (i) Whitman was “hands-on” regarding HP’s
3 Autonomy division; (ii) Lynch was a direct Whitman report; and (iii) Autonomy’s CFO,
4 Sushovan Hussain, was a direct report to HP CFO Lesjak. ¶¶65, 76, 100, 109, 177. Indeed, on
5 November 21, 2011, Whitman stated that Autonomy was her “*priority number one, two and*
6 *three for 2012*,” and represented that she would “obviously step back and take a hard look at this
7 [acquisition]...and I’ll dive in and have a more informed [] view for you probably at our next
8 earnings call.” ¶177.

9 The Complaint then specifically alleges that, by year-end 2011, HP’s corporate auditor,
10 Ernst & Young LLP (“E&Y”) also began reviewing Deloitte’s Autonomy audit work papers in
11 connection with E&Y’s year-end audit for HP. ¶75. The Complaint alleged how and why
12 Autonomy’s revenue recognition “problem should have been almost immediately apparent to HP
13 upon completion of the acquisition. It would have had costs against which it could not book
14 revenue coming out of unfulfilled contracts in both the unended quarter prior to the 2011 year
15 end plus costs going into the early quarters of 2012.” *Id.* HP does not plausibly explain how it
16 could possibly have missed Autonomy’s problems by this time period. And if it suggests on
17 reply that it did miss Autonomy’s problems, it was severely reckless in doing so. ¶¶16-25, 29-40,
18 46-67, 69, 72-77, 85-87, 89, 91-96, 100-02, 137-39, 141, 146-48.

19 By December 2011, as Lesjak, Murrin and Whitman learned first-hand about Autonomy’s
20 improper revenue recognition practices, HP simultaneously began a gradual wind-down of those
21 practices which began to manifest in HP/Autonomy’s publicly-reported Software Segment results
22 in February 2012. ¶¶77-79, 100, 182-86. The now uncontested forensic analysis provided in the
23 Complaint buttresses Plaintiff’s accounting allegations. In the six quarters leading up to the
24 Autonomy Acquisition, for example, the Complaint alleges that Autonomy’s revenues equated to
25 approximately 31% of HP’s software revenue (or approximately 24% of the combined revenues).
26 ¶77. Between 1Q09 and 2Q11, Autonomy’s reported operating margin ranged from 40% to
27
28

1 50%,¹⁸ averaging 43.4%. HP's software revenue operating margin between 2Q10 and 4Q11
2 ranged between 17.6% and 28%, averaging 23.5%. *Id.* Hence, expecting that just one-quarter of
3 HP's Software Segment revenue would benefit from the Autonomy margins that Apotheker
4 publicly touted about Autonomy on August 18 and September 13, 2011, the Complaint alleges
5 that analysts had expected HP's software margin to spike to 27.3% (J.P. Morgan), with the
6 consensus analyst estimate at 21.9%, well above the previous year's 1Q11 software operating
7 margin of 17.6%. *Id.* Yet, on February 22, 2012, HP reported only a 17.1% software operating
8 margin. *Id.* This trend continued in 2Q12 and 3Q12, with HP software operating margins of
9 17.7% (v. 2Q11 of 20.2% and consensus of 20.4%) and 18% (v. 3Q11 of 19.4% and consensus of
10 22.2%). ¶¶77, 191-208.

11 The Complaint then carefully describes how HP's publicly-reported license revenue
12 growth also curiously began to deteriorate after HP's Software Segment started incorporating
13 Autonomy. ¶¶78, 145. For instance, HP revealed that its license revenue accounted for
14 approximately 32% of HP's software revenues (which ranged between \$656 million to \$1.02
15 billion a quarter between 1Q10 and 3Q12). ¶78. Autonomy's license revenue ranged between
16 \$121 and \$180 million between 1Q10 and 2Q11. *Id.* Thus, incorporating Autonomy's historical
17 financial statements and license revenue on HP's books should have *increased* HP's license
18 revenue growth significantly in 2012. *Id.* In the four quarters leading up to HP's integration of
19 Autonomy, HP reported license revenue growth between 3% and 33%, averaging 23.5%. ¶¶78,
20 147. For the four quarters before the Autonomy Acquisition was announced, Autonomy reported
21 license revenue growth between 10% and 23%, averaging 15.5%. Yet, in 1Q12, 2Q12 and 3Q12,
22 HP reported license revenue growth of just 12%, 7% and 2%, respectively. ¶78.

23 Defendants claim that Lead Plaintiff's allegations are "implausible" because one should
24 have expected HP Software numbers to *increase* after the Autonomy acquisition. Defendants'
25 effort to mischaracterize the Complaint in this manner is not the least bit illuminating. The
26 Complaint specifically alleges that HP's Software Segment's disappointing gross margins and

27 ¹⁸ Autonomy's 3Q09 operating margin was an outlier caused by significant spending on a
28 product launch. ¶77 n.28.

1 license revenue growth were caused by HP's efforts to *fix* the Autonomy unit's materially
2 inflated high growth rates and margins. ¶¶74-77. Rather than disclose that HP was experiencing
3 lower than expected operating margins and license revenue growth as a result of HP's efforts to
4 *unwind* Autonomy's materially inflated revenue, profits, EPS, growth rates and margins, the
5 Complaint alleges that Whitman, Murrin and Lesjak concealed these facts. ¶¶74-82, 133-34,
6 145, 149-58, 182-206. The Complaint further alleges that the decline in HP's software license
7 revenue growth also coincided with explosive growth in HP's software services revenue, strongly
8 suggesting that Autonomy's revenue recognition for SaaS term deals were being aligned with
9 GAAP negatively weighing on HP/Autonomy's reported license revenue growth. ¶186.

10 Finally, the Complaint alleges that while Defendants knew that "roughly 250 Autonomy
11 employees [] quit" since the acquisition closed, including Autonomy's President, COO, Chief
12 Marketing Officer and Chief Technology Officer, they represented in February 2012 that HP's
13 integration efforts were "going well." ¶¶81, 185. Defendants' dismissal papers ignore that one
14 of the Complaint's key sources about Whitman's and Lesjak's misleading integration statements
15 was no less than HP's own top fifteen Class Period Executive Officer – Defendant Lynch – who
16 revealed in yet another "open letter" that "[t]he former management of Autonomy began alerting
17 Ms Whitman *as early as December 2011* to significant problems with the integration of
18 Autonomy into HP that were negatively impacting its performance...*Why was this not*
19 *communicated to shareholders at that time?*" ¶102.

20 **D. A Senior HP/Autonomy Executive Thwarts Defendants' Efforts to Quietly**
21 **Fix Autonomy**

22 In May 2012, the Complaint alleges that a "senior member of Autonomy's leadership
23 team" disclosed serious accounting improprieties at HP/Autonomy to HP GC Schultz and
24 Defendant Whitman. ¶¶80, 84, 88, 152. This material development, too, was concealed from
25 investors. In Defendant Lynch's words, subsequent to his removal from HP, "why did HP senior
26 management apparently wait six months to inform its shareholders of the possibility of a *material*
27 event related to Autonomy?" ¶100. Then, on August 22, 2012, the Complaint asserts that
28 Whitman began to partially disclose, however incompletely, that "*Autonomy still requires a*

1 *great deal of attention and we've been aggressively working on that business.*" ¶¶82, 200. By
2 the time she made this statement, Defendant Whitman had known about the May 2012
3 whistleblower for three full months. ¶80. The same day, HP revealed that its Software Segment
4 results had worsened, and warned that it could record a goodwill impairment in that segment,
5 causing at least one analyst to note that "[a]fter Autonomy's poor performance the last couple
6 quarters, we suspect that goodwill associated with Autonomy will constitute part of the write-
7 off." ¶¶82, 202, 214. In response to these partial disclosures and half-truths, HP's share price
8 fell approximately 11.5% from a closing price of \$19.47 on August 21, 2012 to a closing price of
9 \$17.23 on August 23, 2012. ¶¶82, 203, 216.

10 Three months after the May 2012 whistleblower alerted HP to HP/Autonomy's
11 accounting fraud, the Complaint also alleges that Whitman misleadingly attributed Autonomy's
12 problems to "classic entrepreneurial Company *scaling challenges*." ¶¶172, 191. It was a highly
13 misleading justification given the facts then known to her.¹⁹ ¶80. By September 7, 2012,
14 Morningstar highlighted that "[t]he software division...stands out with its failure to deliver
15 growth," adding that HP's results were "a *far cry* from the growth trajectory that HP must have
16 expected to justify the steep price tag of this [Autonomy] acquisition." ¶203. Around the same
17 time, Indigo Equity Research observed that "HP *hinted* at possible further write-downs next Q
18 for Autonomy," explaining that "[s]oftware is relatively limited and uncompetitive, despite the
19 Autonomy acquisition." *Id.* Morningstar added that "HP's expansion in...[s]oftware (via
20 Autonomy) is not paying off." *Id.* By this time, Defendant Whitman had known about the May
21 2012 whistleblower for four full months.

22 **E. The Class Period Ends**

23 On November 20, 2012, the Company revealed what all of the Defendants, except
24 perhaps Defendants Lesjak, Lynch and HP Board member John H. Hammergren, were at least
25 reckless in not knowing since at least July 2011 – namely, that "Autonomy was substantially
26

27 ¹⁹ Notably, in September 2011, Apotheker made the exact opposite statement when he said
28 that HP "*bring[s] scale*, essentially scale and complementarily to that asset only makes it an even
more palpable asset for us because it gives us the opportunity to really provide a return very
quickly for our shareholders." ¶171.

1 overvalued at the time of its acquisition.” ¶¶5, 8, 37, 85, 217. Defendants’ suggestion that
2 Lynch’s misconduct had “severely impacted HP management’s ability to fairly value Autonomy
3 at the time of the deal” is implausible given the fact that the Complaint specifically alleges that
4 HP’s own CFO (Lesjak) had earlier told the full HP Board – that Autonomy was overvalued
5 during a July 2011 Board meeting. ¶¶32, 85.

6 The same day, HP revealed that Autonomy had concealed \$100 to \$200 million of
7 hardware costs within its reported sales and marketing expenses for 2010 and 2009 – which
8 previously totaled \$375 million for 2010 and 2009 to inflate its reported gross profit. HP
9 therefore has sought to represent that up to 50% of Autonomy’s reported sales and marketing
10 costs were fictitious and overstated, but that HP failed to discover that significant discrepancy
11 until November 2012. Asked whether HP was “stable” given HP’s torrid revelations, Defendant
12 Whitman almost instinctively retorted that “the two people that should have been held
13 responsible [Apotheker and Robison] are gone.” ¶86. Now, per her Fed. R. Civ. P. 12(b)(6)
14 motion, she claims that Defendants Apotheker and Robison both acted in the “utmost good
15 faith.” Dkt. No. 139 at 1.

16 **III. LEGAL STANDARDS**

17 In assessing a Fed. R. Civ. P. 12(b)(6) motion in a PSRLA case, courts are to consider the
18 complaint in its entirety, “accept all factual allegations...as true” and construe them in the light
19 most favorable to plaintiff. *Tellabs*, 551 U.S. at 314; *see Commc’ns. Workers of Am. Plan for*
20 *Emps. Pensions & Death Benefits v. CSK Auto Corp.*, 525 F. Supp. 2d 1116, 1120 (D. Ariz.
21 2007). The question is not whether a plaintiff will prevail in the action, but whether she is
22 entitled to offer evidence in support of her claim. *See In re LDK Solar Sec. Litig.*, 584 F. Supp.
23 2d 1230, 1241 (N.D. Cal. 2008). A complaint should not be dismissed if it contains sufficient
24 factual matter that, accepted as true, states a claim for relief that is plausible on its face. *See*
25 *Ashcroft v. Iqbal*, 556 U.S. 662, 884 (2009). Stated differently, a motion to dismiss should be
26 denied if the factual content in the complaint “allows the court to draw the reasonable inference
27 that the defendant is liable for the misconduct alleged.” *Id.*; *see In re Amgen Inc. Sec. Litig.*, 544
28 F. Supp. 2d 1009, 1022 (C.D. Cal. 2008).

1 To state a claim under §10(b) of the Exchange Act, a plaintiff must allege: (1) a false
2 statement or omission; (2) of material fact; (3) made with scienter; (4) on which the plaintiff
3 justifiably relied; and (5) that proximately caused the alleged loss. *See Binder v. Gillespie*, 184
4 F.3d 1059, 1063 (9th Cir. 1999); *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005).²⁰
5 Falsity is adequately alleged by “specify[ing] each statement alleged to have been misleading”
6 and “the reason or reasons why the statement is misleading.” 15 U.S.C. §78u-4(b)(1)(B). A
7 complaint sufficiently pleads falsity where, as here, it includes (1) each statement or omission
8 alleged to have been misleading (§§44, 58, 76, 80, 111, 127, 134, 142-43, 145, 149-58, 163-64,
9 168-69, 171-72, 174, 176-80, 182, 184-85, 187-89, 190-92, 194, 196-97, 199-202, 204-06);
10 (2) the reason or reasons why they statement or omission is misleading (§§58, 150, 153, 158, 165,
11 172-73, 175-76, 178-79, 181, 186, 188, 193, 195-96, 198-99, 201, 205-06); and (3) all facts on
12 which that belief is formed (§§15-25, 31-102, 126-41, 148, 152, 155, 157, 159-62, 166-69). *See*
13 *Desaigoudar v. Meyercord*, 223 F.3d 1020, 1023 (9th Cir. 2000); *In re Omnivision Techs. Sec.*
14 *Litig.*, 2013 U.S. Dist. LEXIS 46032, at *15-17 (N.D. Cal. 2013).

15 In this Circuit, assessing falsity and scienter is often a “unitary inquiry” because they are
16 often “‘strongly inferred from the same set of facts.’” *In re Daou Sys.*, 411 F.3d 1006, 1015 (9th
17 Cir. 2005). To plead scienter, a plaintiff must “‘state with particularity facts giving rise to a
18 strong inference’ that defendants acted with the intent to deceive *or with deliberate recklessness*
19 as to the *possibility* of misleading investors.” *Berson*, 527 F.3d at 987. “The inference that the
20 defendant acted with scienter need not be irrefutable, *i.e.*, of the ‘smoking gun’ genre, or even the
21 ‘most plausible of competing inferences.’” *Tellabs*, 551 U.S. at 324. A complaint survives if,
22 “[w]hen the allegations are accepted as true and taken collectively,” a reasonable person would
23 “deem the inference of scienter at least as strong as any opposing inference[.]” *Id.* at 326. In
24 other words, a tie goes to the Plaintiff. The Court should “consider the totality of circumstances,
25 rather than to develop separately rules of thumb for each type of scienter allegation.” *S. Ferry LP*
26 *v. Killinger*, 542 F.3d 776, 784 (9th Cir. 2008). Here, the Complaint alleges myriad facts which,

27
28 ²⁰ None of the Defendants contest the loss causation and only Defendant Lynch disputes the
element of reliance.

1 taken together, adequately allege scienter as to each of the §10(b) Defendants. *See In re*
2 *SunPower Sec. Litig.*, 2011 U.S. Dist. LEXIS 152920, at *15-17 (N.D. Cal. 2011) (Seeborg, J.).

3 The Ninth Circuit has also just recently reiterated that while a *dual* scienter analysis
4 remains permissible, the “risk...is that a *piecemeal* analysis will obscure a *holistic* view.”
5 *VeriFone*, 704 F.3d at 703; *see Frank v. Dana Corp.*, 646 F.3d 954, 961 (6th Cir. 2011). The
6 Court should therefore review “all the allegations holistically,” *Matrixx*, 131 S. Ct. at 1324, “to
7 determine whether the insufficient allegations combine to create a strong inference of intentional
8 conduct or deliberate recklessness.” *Gammel*, 2013 U.S. Dist. LEXIS 68026, at *47-48; *see*
9 *VeriFone*, 704 F.3d at 703 (“[W]e approach this case through a holistic review of the allegations
10 to determine whether they combine to create a strong inference of intentional conduct or
11 deliberate recklessness.”). Moreover, and critically under our facts, this Circuit has now made
12 unmistakably clear that “[r]ecklessly turning a ‘blind eye’ to impropriety is equally culpable
13 conduct under Rule 10b-5.” *Id.* at 708.²¹

14 One other thing also now bears mentioning. In seeking dismissal, Defendants rely on
15 authorities that have been either expressly abrogated by the Ninth Circuit or drastically narrowed
16 by the United States Supreme Court. *See Tellabs*, 551 U.S. 308; *S. Ferry*, 542 F.3d at 784
17 (“[*Tellabs*] suggests that perhaps *Silicon Graphics*, *Vantive* and *Read-Rite* are *too demanding*
18 and focused *too narrowly* in dismissing vague, ambiguous, or general allegations outright.”).²²
19 Defendants also overlook that *S. Ferry* “represent[ed] a seismic shift in the [Ninth] Circuit’s
20

21 ²¹ In *In re McKesson, Inc. Sec. Litig.*, 126 F. Supp. 2d 1248, 1272 (N.D. Cal. 2000),
22 defendants, as here, argued that allegations from “newspaper articles should be discounted
23 because they are hearsay.” Judge Whyte disagreed, reasoning that “[e]ven under the Reform Act,
24 plaintiffs are only required to plead facts, not to produce admissible evidence.” *Id.* Thus, “if the
25 newspaper article includes numerous factual particulars and is based on an independent
investigative effort, it is a source that may be credited in determining whether plaintiffs have
alleged facts sufficient to raise a strong inference of scienter.” *Id.*; *see also* ¶14 n.7 (“HP has
obtained neither a retraction nor a correction of the news articles quoting HP insiders as referred
to herein.”).

26 ²² Dkt. No. 139 at 10 (citing *In re Vantive Corp. Sec. Litig.*, 283 F.3d 1079 (9th Cir. 2002);
27 Dkt. No. 131 at 2, 7, 10 (citing *In re Silicon Graphics Sec. Litig.*, 183 F.3d 970 (9th Cir. 1999));
28 Dkt. No. 136 at v, 2 (citing *Silicon Graphics*); Dkt. No. 133 at 26 (citing *In re Read-Rite Corp.*
Sec. Litig., 335 F.3d 843 (9th Cir. 2003); Dkt. No. 133 at 6, 7, 26 (citing *Silicon Graphics*); Dkt.
No. 127 at 9 (citing *Vantive*, 283 F.3d 1079).

1 analysis of securities fraud complaints and significantly lowers the bar for pleading scienter[.]”
2 *Teamsters Local 617 Pension & Funds v. Apollo Group, Inc.*, 633 F. Supp. 2d 763, 788-89 (D.
3 Ariz. 2009); *see also Matrixx*, 131 S. Ct. at 1322. Indeed, following *S. Ferry*, *Matrixx* and
4 *Tellabs*, the Ninth Circuit’s most recent published discussion of scienter ignored *Vantive* and
5 *Read-Rite* altogether and expressly found that *Silicon Graphics* had been “abrogated.” *VeriFone*,
6 704 F.3d at 701.

7 **IV. ARGUMENT**

8 **A. Defendants’ False and Misleading Class Period Statements Are** 9 **Actionable**

10 **1. Defendants Were Reckless in Not Knowing About Autonomy’s** 11 **Possible Impairments**

12 Defendants Apotheker, Lane, Whitman and Robison broadly claim that the falsity of their
13 August and September 2011 statements has not been adequately alleged because Plaintiff lacks
14 proof that they were aware of *any* “red flags” about Autonomy in the period leading up to the
15 Company’s August 18, 2011 announcement. Dkt. No. 142 at 3, 5; Dkt. No. 127 at 7; Dkt. No.
16 136 at 6, 7 & n.10; Dkt. No. 131 at viii, 11. Their claim is hard to credit.²³ *S. Ferry*, 542 F.3d at
17 785. ¶¶15-25, 47-49, 92. First, Whitman has already admitted that she learned about reports
18 accusing Autonomy of questionable accounting practices upon the announcement of the
19 Autonomy deal.²⁴ ¶¶69, 73, 87-89; *see also* ¶¶92, 96, 100. Next, in the years leading up HP’s

20 ²³ Plaintiffs do not claim that Defendants had a duty to disclose the negative reports about
21 Autonomy. Dkt. No. 139 at 7. Rather, those analyst reports should have (and the market
22 assumed that they did) caused Defendants to conduct thorough and extensive due diligence on
23 Autonomy. Thus, when Defendants told investors that HP had conducted extensive diligence and
24 repeated Autonomy’s financial results, those statements were material. By contrast, the publicly
25 available information in *Higginbotham v. Baxter Int’l, Inc.* “had no apparent link to the fraud.”
26 495 F.3d at 753, 759 (7th Cir. 2007).

27 ²⁴ *VeriFone*, 704 F.3d at 707-08, 710, credited allegations that defendants were “hands-on
28 managers” who “were on notice that there might be issues.” Dkt. No. 133 at 12. In *Roth v.*
29 *OfficeMax, Inc.*, 527 F. Supp. 2d 791, 798-99 (N.D. Ill. 2007), there was no admission by
30 defendants that they knew about the “red flags.” Dkt. No. 131 at 11. In *In re Silicon Storage*
31 *Tech. Inc.*, 2006 WL 648683, at *17 (N.D. Cal. 2006), the court refused to infer that defendants
32 were aware of one “irrelevant” analyst report which “did not concern” defendants’ products.
33 Dkt. No. 142 at 3. *Reiger v. Price Waterhouse Coopers LLP*, 117 F. Supp. 2d 1003, 1007-08
34 (S.D. Cal. 2000) and *Stephenson v. Pricewaterhousecoopers, LLP*, 768 F. Supp. 2d 562, 571-73
35 (S.D.N.Y. 2011) applied the heightened standard for auditor scienter. Dkt. No. 133 at 12; Dkt.
36 No. 136 at 7 & n.10, 8 n.11; In *Saltz v. First Frontier, L.P.*, 485 F. App’x 461, 464 (2d Cir.

1 August 18, 2011 announcement, numerous analysts voiced concern about Autonomy’s revenue
2 and seemingly gravity-defying growth rates. ¶¶17-25. From 2007 to 2010, analysts variously
3 accused Autonomy of: (i) “benefit[ing] significantly” from questionable changes in clarifying
4 certain accounting items; (ii) “consistently overstated revenue and grossly understated expenses;”
5 (iii) “[m]assaging [its] growth rate;” (iv) “extremely misleading statements about its accounting;”
6 (v) “unusual items in the accounts;” (vi) “revenue recognition [that] may have been accelerated;”
7 (vii) “evidence to suggest the early recognition of revenues;” (viii) “[u]nusual balance sheet
8 movements;” (ix) “growth rates [that] appear to be overstated;” (x) “early recognition of deferred
9 revenues;” and (xi) “never growing as quickly as it said it was.” ¶¶17, 19-22, 30. To the extent
10 they want to now argue they were unaware of these issues, that supports Defendants’
11 recklessness.

12 Despite these questions, on August 18, 2011, Defendant Apotheker unequivocally
13 represented that “Autonomy’s recent operating and financial performance has been strong,
14 including its most recent results for the quarter ending June 30, 2011. Over the last five years,
15 Autonomy has grown its revenues at a compound annual growth rate of approximately 55 percent
16 and adjusted operating profit at a rate of approximately 83 percent.” ¶¶44, 163. In response to a
17 specific analyst question about Autonomy during a same day conference call, Apotheker
18 represented that:

19 Autonomy has grown its revenues at a compound annual growth rate of
20 approximately 55% and adjusted operating profit at a rate of approximately 83%
21 over the last 5 years. We’re buying *a very strong business* and we believe that
22 we can extract a lot more out of this business by combining it with HP.

23 ¶164. Apotheker also represented that “[i]n 2010, Autonomy had gross margins in the high 80s
24 and operating margins above 40%[]” and noted that Autonomy has “demonstrated a strong
25 consistent track record of double-digit revenue growth.” ¶¶44, 164. Likewise, HP reiterated that
26 Autonomy was “highly profitable,” and “[e]nhances HP’s financial profile” given its “strong
27 growth and profit margin profile” and “consistent track record of double-digit revenue growth,
28 with 87 per cent gross margins and 43 percent operating margins in calendar year 2010.” ¶164.

2012), there were no allegations that an investment advisor was aware of red flags, but merely
that it had “a presumed duty...to be aware of what is going on.”

1 Defendants' suggestion that the negative analyst and other reports about Autonomy
2 should not be credited because other analysts took a different view makes no sense. Dkt. No. 142
3 at 3, 7-8; Dkt. No. 139 at 6; Dkt. No. 133 at 4, 12-13. The Complaint does not deny that there
4 were two narratives about Autonomy in the lead up to HP's offer: "whether it was a 'real
5 innovation-driven tech story [], or a M&A-led roll-up with a healthy dash of questionable
6 accounting." ¶25. Rather, it alleges that when HP represented that it had conducted "extensive"
7 due diligence and repeated Autonomy's publicly-reported financial statements, the market was
8 led to believe that HP had taken adequate steps to rule out the possibility that Autonomy's
9 "questionable" accounting practices were true. HP's failure to do so, while affirmatively creating
10 the opposite impression, was highly misleading.

11 The Complaint also alleges that analysts had also specifically noted that Autonomy
12 reported consistently high DSOs – a telltale indicator of improper revenue recognition (¶¶21, 46,
13 137 & n.36) and specifically questioned whether Autonomy was improperly recognizing
14 hardware revenue as software revenue – the very practice that HP later accused Autonomy's
15 management of engaging in. ¶¶91-95. Then, upon the announcement of HP's \$11 billion offer,
16 HP's stock price fell 20%, while Autonomy's stock price surged 75%. ¶45. Analysts described
17 HP's offer as nothing short of "defy[ing] logic." ¶46. On August 29, 2011, the Complaint
18 alleges that Defendants learned that Autonomy OEM was not used nearly as widely or
19 extensively as Autonomy claimed. ¶¶49, 57. Defendants' suggestion that they did not know
20 about the accusations raised about Autonomy's OEM business is belied by the fact that they were
21 summarized in a publicly-available analyst report days after the announcement.²⁵ Dkt. No. 127 at
22 8 n.7; Dkt. No. 136 at 6; Dkt. No. 133 at 14. Nor were the red flags about Autonomy merely
23 "idle [i]nternet speculation" as in *Pittleman v. Impac Mortg. Holdings, Inc.*, 2008 WL 4809962,
24 at *2 (C.D. Cal. 2008). ¶¶48-49, 57, 61; Dkt. No. 133 at 14. Moreover, CFO Lesjak's sudden
25 decision to cancel a road show appearance meant to defend the deal, just one week after the

26
27 ²⁵ In *In re Cisco Sys. Inc. Sec. Litig.*, 2013 WL 1402788, at *11-12 (N.D. Cal. 2013), by
28 contrast, plaintiffs alleged that defendants "would have known" of allegations by virtue of their
positions, not that the information was published by a respected analyst. ¶49; Dkt. No. 127 at 8
n.7.

1 announcement, and despite the negative publicity that it garnered, is strong evidence of HP's
2 knowledge of the red flags about Autonomy. ¶47.

3 **2. Apotheker's Due Diligence Statements Are Actionable**

4 HP and Apotheker claim that Plaintiff makes no allegation that he was aware of the level
5 of due diligence HP performed on Autonomy despite the fact that Apotheker spoke at length
6 about the Company's due diligence in September 2011.²⁶ Dkt. No. 127 at 2; Dkt. No. 133 at 10,
7 27. It's a desperate argument. If Defendant Apotheker was as unaware about HP's Autonomy
8 due diligence as he now claims, then how could he justifiably defend the Company's due
9 diligence efforts without deliberately misleading HP's shareholders? ¶¶41, 58, 86-87, 137, 167,
10 172, 176. To the extent he now claims he was kept in the dark about the level or quality of HP's
11 due diligence, his due diligence statements were misleading. *Ernst & Young*, 641 F. 3d 1089,
12 1098 (9th Cir. 2011).²⁷

13 Defendant Apotheker's representations that HP's due diligence was "rigorous,"
14 "extensive" and "extremely tight" on September 13, 2011 were also misleading when made
15 because the Complaint alleges that he knew that HP relied entirely on Deloitte's *previous* audits
16 of Autonomy's financial statements for its due diligence. ¶¶36, 40-41, 86, 176. *See In re*
17 *Cendant Corp. Litig.*, 60 F. Supp. 2d 354, 371 (D.N.J. 1999) (statement that defendant "did all
18 the due diligence that one does when one buys a public company" actionable where due diligence

19 ²⁶ Plaintiff is not alleging that Defendants' shoddy due diligence, "in itself," demonstrates
20 scienter, *Murdeshwar v. Search Media Holdings, Ltd.*, 2011 WL 7704347, at *17 (S.D. Fla.
21 2011), or merely that defendants "would have learned the truth" if they performed diligence as
22 represented. *McIntire v. China MediaExpress Holdings, Inc.*, 2013 WL 752954, at *17
23 (S.D.N.Y. 2013); *Durgin v. Mon*, 659 F. Supp. 2d 1240, 1255 (S.D. Fla. 2009); *Griffin v. McNiff*,
24 744 F. Supp. 1237, 1251 (S.D.N.Y. 1990); Dkt. No. 127 at 7; Dkt. No. 142 at 6. Rather, the
Complaint alleges that Defendants misrepresented the *extent* of their due diligence and, where
"Defendants were reckless in representing they had conducted due diligence" it "may amount to
a false or misleading statement." *Murdeshwar*, 2011 WL 7704347, at *17; Dkt. No. 127 at 7.

25 ²⁷ Nor is Plaintiff required to allege that HP's "due diligence fell dramatically below
26 standards in the industry." Dkt. No. 133 at 10, 27; Dkt. No. 127 at 6. This is not a case like *City*
27 *of Austin Police Ret. Sys. v. Kinross Gold Corp.*, 2013 WL 1174017, at *19 (S.D.N.Y. 2013)
28 where the false statement at issue was "we have done far more homework than one would
typically see in a significant acquisition," thus necessitating an inquiry into "how [defendant's]
due diligence compared to that done by others." Likewise, in *Schiller v. Physicians Res. Grp.,*
Inc., 2002 WL 318441, at *11 (N.D. Tex 2002), the complaint contained only a conclusory
allegation that defendants "did virtually no due diligence before making acquisitions."

1 was “based almost entirely on public information audited by [the acquisition target’s] auditor”).
2 The Complaint also alleges that, although HP’s due diligence team requested the working papers
3 underlying Autonomy’s audits by Deloitte, Autonomy refused to provide them. ¶¶34; See ¶¶16-
4 17. It also alleges that Defendant Lynch actively limited HP’s due diligence of Autonomy to
5 Autonomy’s publicly-reported financial statements, and approximately 25 sales contracts. ¶¶34,
6 42.²⁸ In their haste to announce the offer by 3Q11, HP’s due diligence team capitulated. ¶34.

7 Following the Class Period, KPMG confirmed that HP’s Autonomy due diligence was
8 “limited.” ¶36.²⁹ In addition, while Whitman and Apotheker have suggested otherwise (¶¶41,
9 86), Deloitte likewise confirmed that it “was not engaged by HP, or by Autonomy, to provide any
10 due diligence in relation to the acquisition of Autonomy.” ¶86.³⁰ The Complaint adds that,
11 although HP’s internal procedures required the Board’s Finance Committee to review and
12 approve acquisitions before they reached the full Board, this procedure was suspiciously not
13 followed for the Autonomy acquisition.³¹ ¶37. In fact, Defendant Lesjak’s dismissal papers

14 ²⁸ See *Sapirstein-Stone-Weiss Found. v. Merkin*, 2013 U.S. Dist. LEXIS 84035, at *16
15 (S.D.N.Y. 2013).

16 ²⁹ In *GSC Partners CDO Fund v. Washington*, 368 F.3d 228 (3d Cir. 2004), defendants
17 conducted nearly a year of intensive due diligence on an acquisition target. *Id.* at 232-35; Dkt.
18 No. 127 at 7, 10; Dkt. No. 133 at 10. In *Brogren v. Phohlad*, 933 F. Supp. 793, 800 (D. Minn.
19 1995) “plaintiffs provide[d] no facts to support the[] allegation[]” that defendants “failed to
conduct due diligence.” In *NECA-IBEW Pension Trust Fund v. Bank of Am. Corp.*, 2012 WL
3191860, at *19 (S.D.N.Y. 2012), “[p]laintiffs d[id] not allege that [defendant] did not perform
its due diligence investigation as it had been represented to investors.” Dkt. No. 133 at 27-28.

20 ³⁰ Despite this, Defendants argue that they were entitled to rely on Deloitte and KPMG.
21 Dkt. No. 142 at 2, 8; Dkt. No. 136 at v, 1, 6 & n.9; Dkt. No. 133 at 24; Dkt. No. 127 at 7; Dkt.
22 No. 139 at 6; Dkt. No. 131 at vii, 4-5, 8, 11. But “[a]uditors are hired and retained by insiders. A
few top auditing firms compete for high-profile clients....Therefore, they have strong structural
incentives to yield to management on close questions.” *In re Countrywide Fin. Corp. Sec. Litig.*,
588 F. Supp. 2d 1132, 1197 (C.D. Cal. 2008). This is particularly true where, as here, Deloitte
23 was not only conflicted but **wasn’t HP’s auditor**. ¶¶36, 40-41, 86. Apotheker argues that these
allegations should be ignored because there is no evidence that he was aware of them. Dkt. No.
24 127 at 7. But “the more likely an [defendant] would have discovered the truth if a reasonable
audit had been conducted, the stronger the scienter inference.” *Ernst & Young*, 641 F. 3d at
25 1098. In *re Alloy, Inc.*, 2011 WL 4863716, at *11 (Del. Ch. 2011) merely states that the fact that
advisors are paid is not sufficient, “**standing alone**,” to state a bad faith claim. Dkt. No. 131 at
26 12, n.5. Finally, the fact that auditors “were retained [to conduct diligence] does not establish, in
and of itself, that ‘extensive due diligence’ was conducted.” *In re Huffy Corp. Sec. Litig.*, 577 F.
27 Supp. 2d 968, 996 (S.D. Ohio 2008).

28 ³¹ The fact that members of HP’s Finance Committee ultimately voted for the deal does not
change the fact that they were prevented from conducting an independent review prior to full

1 confirm that, contrary to best practices (*see id.*), she was stripped of her ability to review HP's
2 due diligence over Autonomy. Dkt. No. 136 at 1, 6; ¶38.

3 The Complaint also alleges that HP's due diligence team was made aware of specific
4 allegations of potential misconduct at Autonomy. Eighteen months before HP announced its
5 offer, a senior finance executive at Autonomy made allegations that Autonomy was engaged in
6 improper revenue recognition practices. ¶¶39, 42. While this information was disclosed to HP's
7 due diligence team before the August 18 announcement, neither HP nor KPMG ran it to
8 ground.³² ¶39. *See Heckmann*, 869 F. Supp. 2d at 530-32, 540-541; *Freedman v. Value Health,*
9 *Inc.*, 958 F. Supp. 745, 754 (D. Conn. 1997). In addition, by August 9, 2011, the Individual
10 Defendants specifically learned that KPMG's "[d]ue diligence comprised telephone discussions
11 with management and access to very limited proprietary financial and tax information. The
12 majority of findings and observations are based on oral representations from management and
13 reading published financial information." Abadou Decl., Ex. D. KPMG contemporaneously
14 informed HP that the City Code resulted in "very limited information being provided prior to a
15 transaction closing" and that "[t]he data and access provided to us during due diligence was very
16 limited." *Id.*; *c/f* Dkt. No. 127 at 7; Dkt. No. 133 at 3 (HP and its advisors "reviewed a number of
17 [Autonomy's] larger sales contracts.").

18 Defendants Robison and Apotheker now claim that they had not "had the opportunity to
19 gain firsthand knowledge as the owner of Autonomy's business," Dkt. No. 142 at 1-2, 5;³³ Dkt.

20 Board review in contravention of HP's policies. Dkt. No. 127 at 10. Indeed, the Finance
21 Committee had blocked Apotheker's previous acquisition of Comverse before that proposed deal
22 reached full Board review. ¶37.

23 ³² Defendants' sole response is that, despite the fact that analysts had questioned
24 Autonomy's Deloitte-audited financial statements for years, as well as Deloitte's independence,
25 they were entitled to rely on Deloitte rather than running the accusation to ground themselves.
26 Dkt. No. 142 at 5-6; Dkt. No. 127 at 8; Dkt. No. 136 at 6; Dkt. No. 133 at 13-14. It's not a very
27 good argument. *See Cendant*, 60 F. Supp. 2d at 371 (statement that defendant "did all the due
28 diligence that one does when one buys a public company" actionable where due diligence was
"based almost entirely on public information audited by [the acquisition target's] auditor").

³³ Contrary to HP's argument (Dkt. No. 133 at 11), *McKesson*, 126 F. Supp. 2d 1248
confirms that HP is liable for repeating Autonomy's publicly-reported financial results if it was
"deliberately reckless to the truth." *Id.* at 1276. Moreover, *McKesson* reiterates that "allegations
of 'red flags'" about "improper accounting practices" are "highly probative of scienter, because it
tends to negate the possibility of innocent mistake." *Id.* at 1274. In *South Cherry St., LLP v.*

No. 127 at 5, 9, 11; Dkt. No. 133 at 11, 26, even though Apotheker told the market that HP *had* conducted extensive due diligence before HP announced its offer to purchase Autonomy. ¶¶58, 176.

Thereafter, Defendants Apotheker, Lane, Whitman and Robison publicly expressed confidence in Autonomy's financial results and told HP's shareholders that those results would improve after the acquisition closed.³⁴ ¶¶163, 168-69, 171-72, 174, 177; *see Diamond Foods*, 2012 U.S. Dist. LEXIS 170704, at *35-37 (inference of scienter where defendants' statements on conference call indicated that they "had actual knowledge of [the company's business segment], and were aware of how that business would impact the company's financial statements"). "At the pleading stage...allegations that significant 'red flags' were ignored, can suffice to withstand a motion to dismiss." *Ernst & Young*, 641 F. 3d at 1102; *Zelman v. JDS Uniphase Corp.*, 376 F. Supp. 2d 956, 971 (N.D. Cal. 2005).³⁵ As here, "the more likely a[] [defendant] would have discovered the truth *if* a reasonable audit *had been* conducted, the stronger the scienter inference." *Ernst & Young*, 641 F. 3d at 1098; *VeriFone*, 704 F.3d at 708; *see also Everex*, 228 F.3d at 1064 (inferring scienter and stating "[defendant] cannot simply argue that he looked the other way"); *S. Ferry LP # 2 v. Killinger*, 687 F. Supp. 2d 1248, 1259-60 (W.D. Wash. 2009).³⁶

Hennese Group LLC, 573 F.3d 98, 112 (2d Cir. 2009), plaintiffs did not plead "any fact" that "should have alerted [defendants, prior to their representations] that the [acquisition target's] representations were dubious." In *Coble v. Broadvision, Inc.*, 2002 WL 31093589, at *4 (N.D. Cal. 2002), the "only" specific allegation that defendants knew about an expense misstatement was the statement of one former employee that the company was "slashing funds for corporate events and travel." Dkt. No. 127 at 5-6, 11; Dkt. No. 136 at 2. Plaintiff does not seek to hold Defendant Robison liable for statements after his termination by HP. Dkt. No. 142 at 1.

³⁴ Plaintiffs are not arguing Defendants' scienter based solely on their positions at HP. Defendants' positions at the Company, however, do add to the scienter calculus. *See Countrywide*, 588 F. Supp. 2d at 1191 ("[A] defendant's position within the company is a relevant circumstance to consider in the *Tellabs* analysis."); *In re Northwest Biotherapeutics Inc. Sec. Litig.*, 2008 U.S. Dist. LEXIS 54028, at *3 (W.D. Wash. 2008).

³⁵ In *Ernst & Young*, the Ninth Circuit found scienter adequately pled against an *outside auditor* because a reasonable investigation *would have* revealed the fraud. 641 F. 3d at 1098. This applies with even more force against the Individual Defendants here because "pleading sufficient facts to support a strong inference of scienter by an outside auditor is difficult because [they] have more limited information than, for example, the *company executives* who oversee the audit." *Id.* at *18, 20.

³⁶ Defendants argue that the Complaint fails to cite a CW, internal report, meeting, or communication. Dkt. No. 139 at 5; Dkt. No. 127 at 8-9; Dkt. No. 136 at 1, 3; Dkt. No. 133 at 1,

1 **3. HP’s Misrepresentations about HP’s Autonomy Valuation Are**
2 **Actionable**

3 The Complaint next alleges that, despite the credible and persistent questions raised about
4 Autonomy’s growth, revenue recognition and OEM business (¶¶24, 47-49, 57, 60-61, 94), in
5 August and September 2011 Defendants extolled Autonomy’s revenue growth, margins, and shift
6 to SAS and reiterated that Autonomy’s OEM business was the “de-facto standard among more
7 than 400 OEMs[.]” ¶¶58, 163-64. “[W]here parties maintain high valuations on assets in the
8 face of red flags that the valuations are inaccurate, courts have sustained securities fraud claims.”
9 *Stratte-McClure v. Stanley*, 784 F. Supp. 2d 373, 387-388 (S.D.N.Y. 2011). On September 13,
10 2011 Apotheker touted Autonomy’s “40% margin,” ¶171, and Defendant Robison added that
11 “[t]here’s no data that indicates the core OEM franchise is deteriorating.”³⁷ ¶174. While HP
12 argues that these statements were not false when made, Dkt. No. 133 at 26, their claim is hard to
13 square with, among other things, HP’s November 20, 2012 concession that Autonomy’s financial
14 results for 2009 and 2010 were overstated by an astonishing **50%**. ¶45 n.21, 87, 137, 141; Dkt.
15 No. 136 at 1-2; Dkt. No. 131 at 4, 9-10.

16 The Complaint also alleges that, on August 13, 2011, just days before HP’s scheduled
17 August 18 announcement, Autonomy demanded even more money from HP. *Id.* Thereafter,

18 7. To the contrary, the Complaint makes CW allegations, describes e-mails sent to HP warning
19 them about Autonomy, names internal and external whistleblowers, internal meetings and
20 conversations, and HP’s internal processes and reviews following the Autonomy acquisition. *See*
21 *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 72 (2d Cir. 2001) (The PSLRA “do[es] not
22 require the pleading of detailed evidentiary matter in securities litigation.”). Defendants’
23 authorities are not to the contrary. In *In re Loral Space & Commc’ns Ltd. Sec. Litig.*, 2004 WL
24 376442, at *17 (S.D.N.Y. 2004), the court merely found that the internal reports pled in the
25 complaint did not support plaintiff’s allegations, not that internal reports are necessary to plead
26 scienter. Dkt. No. 136 at 3, 5, n.6. In *In re ChinaCast Educ. Corp. Sec. Litig.*, 2012 WL
27 6136746, at *6 (C.D. Cal. 2012), there was “a total absence of factual allegations” supporting
28 scienter. In *In re Century Aluminum Co. Sec. Litig.*, 749 F. Supp. 2d 964, 973 (N.D. Cal. 2010),
plaintiff failed to allege how the misclassification of a one-time transaction would have been
obvious to management. Dkt. No. 127 at 8-9.

³⁷ Robison’s statement is material. Dkt. No. 142 at 4 & n.4. Immaterial puffery “use[s]
terms that are not measurable and not tethered to facts that a reasonable person would deem
important to a securities investment decision.” *In re Dura Pharms., Inc. Sec. Litig.*, 452 F. Supp.
2d 1005, 1033 (S.D. Cal. 2006).³⁷ *See also In re REMEC Inc. Sec. Litig.*, 702 F. Supp. 2d 1202,
1234-35 (S.D. Cal. 2010); *In re InfoSonics Corp. Sec. Litig.*, 2007 U.S. Dist. LEXIS 57784, at
*18-19 (S.D. Cal. 2007).

1 Defendant Apotheker twice went to Lane and the Board to authorize additional funds, resulting in
2 HP offering Lynch even more money, despite the fact that Defendant Lynch had refused to
3 provide Autonomy's working papers during HP's due diligence. ¶¶34, 35. The newly negotiated
4 price equated to an 11 times revenue premium for Autonomy. ¶¶24, 42. On August 17, 2011,
5 during an internal Board conference call conducted the day before the announcement, Lesjak
6 again objected to the deal. ¶43.³⁸ By September 2011, Oracle's Larry Ellison described
7 Autonomy's price as "absurdly high" and disclosed that Oracle had rejected a proposal to acquire
8 Autonomy for \$6 billion: we "told Mr. Lynch that with a current market value of \$6 billion,
9 Autonomy was already *extremely over-priced*." ¶60. Likewise, Dell's Michael Dell refused to
10 give Autonomy serious consideration, stating "[n]ot at that price. That was an overwhelmingly
11 obvious conclusion that any reasonable person would draw." ¶61.

12 On September 13, 2011, analysts grilled Defendants Apotheker and Robison about HP's
13 offer, stating that it "seemed to be anticipating explosive growth...yet our analysts that cover
14 Autonomy think it's growing in the high, *single-digits organically*." ¶172. In response,
15 Apotheker defended HP's offer price, assuring investors that HP had "a pretty rigorous
16 process...that we follow for all of our acquisitions [] and we try to take a very conservative view
17 at this...[.]" "*just take it from us*" he said, "[w]e did that analysis at great length, in great detail,
18 and we feel that we paid a very fair price for Autonomy." ¶¶58, 172. Although Apotheker now
19 argues that his statements are immaterial as a matter of law, Dkt. No. 127 at 3, 12, statements are
20 not deemed mere puffery where, as here, they are "either immediately preceded or followed by
21 very specific statements of fact that supposedly justify or supply a foundation for the optimism."
22 *S. Ferry LP # 2 v. Killinger*, 399 F. Supp. 2d 1121, 1129-30 (W.D. Wash. 2005); *see In re St.*
23 *Jude Med. Inc. Sec. Litig.*, 836 F. Supp. 2d at 878, 888 (D. Minn. 2012) (statements not puffery
24

25 ³⁸ Unlike *Hanrahan v. Hewlett-Packard Co.*, 2006 WL 1699573, at *4-5 (N.D. Cal. 2006),
26 where plaintiff alleged that statements that the Board had unanimously approved a merger were
27 misleading because one board member had voiced opposition prior to voting for the deal, Dkt.
28 No. 133 at 16, n.5; Dkt. No. 127 at 9-10, Lesjak's vehement opposition to the price of the deal, in
conjunction with the myriad other red flags discussed above, suffice to plead Apotheker's
reckless disregard or willful blindness.

1 where they were a direct response to analyst's question). Lane made similar actionable
2 misstatements. ¶¶177-78.

3 Nor does Plaintiff merely allege "fraud by hindsight," or that Apotheker was simply a
4 "bad manager." Dkt. No. 127 at 9. The Complaint specifically alleges that Autonomy's reported
5 \$6 billion market value already exceeded by more than seven times its reported annual revenue
6 and 15 times its operating profit in the period leading up to the deal. ¶¶33, 35. During a July 20,
7 2011 Board meeting, HP's CFO Lesjak bristled at the price of the deal (¶35), and told the full
8 Board (including Whitman, Lane, and Apotheker) that "I can't support [the Autonomy
9 Acquisition]. I don't think it's a good idea. I don't think we're ready. I think it's too expensive.
10 ***I'm putting a line down.*** This is not in the best interests of the Company." ¶¶32, 42, 173. *See*
11 *Duke Energy*, 2013 U.S. Dist. LEXIS 110693, at *21 (falsity established where several board
12 members "had mounted significant yet undisclosed opposition").

13 **4. Defendants' Due Diligence and Valuation Misrepresentations Are Not** 14 **Mere Statements of Corporate Optimism**

15 Only "statements on the extreme edge of generality and vagueness may be insufficient as
16 a basis for a securities fraud claim.... '[T]he exception for puffery is narrowly drawn.'" *S. Ferry*,
17 399 F. Supp. 2d at 1130 (quoting *Casella v. Webb*, 883 F.2d 805, 808 (9th Cir. 1989)). While
18 Apotheker suggests otherwise, his "statements of [HP's] 'rigorous due diligence' are hard facts
19 because these allegations are capable of empirical verification." *Garden City Emps.' Ret. Sys. v.*
20 *Psychiatric Solutions, Inc.*, 2011 U.S. Dist. LEXIS 35661, at *133-34 (M.D. Tenn. 2011); ¶¶58,
21 87, 137, 172.

22 Here, the Complaint alleges that Apotheker misrepresented that HP had applied an
23 "extremely tight and very professional due diligence process" that was "conservative,"
24 "rigorous," and had resulted in a "***very fair price***" for Autonomy. ¶¶58, 172. These are not mere
25 statements of corporate optimism, Dkt. No. 133 at 28; Dkt. No. 127 at 3, 12; *see S. Ferry*, 399 F.
26 Supp. 2d at 1129-30,³⁹ because specific statements made to quell investor concern are not

27 ³⁹ *See In re DDi Corp. Sec. Litig.*, 2005 U.S. Dist. LEXIS 28216, at *53-54 (C.D. Cal.
28 2005); *SEC v. Mozilo*, 2009 U.S. Dist. LEXIS 104689, at *25 (C.D. Cal. 2009); *Morgan v. AXT,*
Inc., 2005 U.S. Dist. LEXIS 42346, at *29-31 (N.D. Cal. 2005) (same).

1 puffery. *See Warshaw v. Xoma Corp.*, 74 F.3d 955, 959-60 (9th Cir. 1996). Moreover,
2 Apotheker's statements were not "generalized statements of corporate optimism, but [a]
3 response[] to specific questions posed during the conference calls." *In re Ligand Pharms., Inc.,*
4 *Sec. Litig.*, 2005 U.S. Dist. LEXIS 44911, at *61-62 (S.D. Cal. 2005).⁴⁰ "Both the fact of the
5 misrepresentation about performing due diligence and its materiality to a reasonable investor are
6 patent." *In re J.P. Jeanneret Assocs.*, 769 F. Supp. 2d 340, 356-58 (S.D.N.Y. 2011); *Psychiatric*
7 *Solutions, Inc.*, 2011 U.S. Dist. LEXIS 35661, at *133-34.⁴¹

8 **B. Defendants' Statements Are Not Protected by the PSLRA's "Safe Harbor"**

9 Only forward-looking statements are protected by the Private Securities Litigation
10 Reform Act's ("PSLRA") "safe harbor" and "statements are not considered forward-looking just
11 because there are other forward-looking statements made in their proximity." *In re Amylin*
12 *Pharms., Inc. Sec. Litig.*, 2003 U.S. Dist. LEXIS 7667, at *19 (S.D. Cal. 2003); *see also In re*
13 *Musicmaker.com Sec. Litig.*, 2001 U.S. Dist. LEXIS 25118, at *68 (C.D. Cal. 2001). Despite
14 these principles, Defendant Robison argues that his statement that OEM "'will continue' to
15 grow" are shielded by the PSLRA. Dkt. No. 142 at 4 & n.5. His statement, however, "concerns
16 historical and current facts" because "for the [OEM] to 'continue to grow,' it is necessary that
17 they have **already been growing**." *Mallen v. Alphatec Holdings, Inc.*, 2012 U.S. Dist. LEXIS
18 39416, at *32-35 (S.D. Cal. 2012).⁴² To hold otherwise would permit "any corporation [to]

19
20 ⁴⁰ *Yahoo!*, 2012 U.S. Dist. LEXIS 113036, at *51 acknowledged that statements that might
21 otherwise be puffery may be actionable when "made in response to [specific market] concerns."
22 Dkt. No. 127 at 3, 12. In *Kinross Gold*, 2013 WL 1174017, at *16 and *Philco Inv., Ltd. v.*
23 *Martin*, 2011 WL 4595247 (N.D. Cal. 2011), the statements were not made in response to
24 specific analyst questions or investor concern. Dkt. No. 133 at 28. In *In re Cutera Sec. Litig.*,
610 F.3d 1103, 1111 (9th Cir 2010), the company's statement that its "employee relations are
good" was too vague to bear on the core question of whether the company disclosed the need to
restructure its sales force.

25 ⁴¹ *See also In re New Century*, 588 F. Supp. 2d at 1206, 1226-27 (C.D. Cal. 2008); *Stocke v.*
26 *Shuffle Master, Inc.*, 615 F. Supp. 2d 1180, 1191 (D. Nev. 2009); *Batwin v. Occam Networks,*
27 *Inc.*, 2008 U.S. Dist. LEXIS 52365, at *40-41 (C.D. Cal. 2008); *In re RAIT Fin. Trust Sec. Litig.*,
2008 U.S. Dist. LEXIS 103549, at *25-26 (E.D. Pa. 2008).

28 ⁴² *See also In re Foundry Networks, Inc. Sec. Litig.*, 2003 U.S. Dist. LEXIS 18200, at *13-
14 (N.D. Cal. 2003) (statement that company's "biggest challenge [was] to continue to meet
demand, concern[s] then existing conditions").

1 shield itself from future exposure for past misconduct by making present-tense statements
2 regarding the misconduct and its effects on the corporation.” *Am. W. Holding*, 320 F.3d at 929,
3 937. For this reason, courts have found Robison’s authorities “problematic” because they do not
4 “explain[] how a past or present *fact* can be deemed an ‘assumption’ because only assumptions
5 underlying a prediction about the future are protected by the safe harbor provision.” *Westley v.*
6 *Oclaro, Inc.*, 897 F. Supp. 2d 902, 918 (N.D. Cal. 2012).

7 Whitman’s statements are similarly not protected by the PSLRA’s safe harbor. Dkt. No.
8 139 at 12. First, the majority of Whitman’s statements are statements of present fact. ¶¶76, 80,
9 111, 127, 134, 142-43, 145, 149-58, 177, 178-80, 182, 184-85, 187-89, 190-92, 194, 196-97,
10 199-200, 204-06. Moreover, Whitman’s “statements were not allegedly misleading because they
11 failed to predict the future, but because they concealed or downplayed” current undisclosed facts.
12 *In re Nuvelo, Inc. Sec. Litig.*, 668 F. Supp. 2d 1217, 1230-31 (N.D. Cal. 2009); *see* ¶¶76-82, 111,
13 127, 134, 142-43, 145, 149-58, 177-82, 184-200, 204-06.⁴³ Because Plaintiff alleges that these
14 statements were misleading due to her omissions, they are not protected by the PSLRA’s safe
15 harbor.⁴⁴ *See New Century*, 588 F. Supp. 2d at 1225-27. Further, the PSLRA only protects
16 “forward-looking statement[s]...accompanied by meaningful cautionary statements.” *Cutera*,
17 610 F.3d at 1112. Dismissing a statement under the safe harbor requires Defendants to make “a
18 stringent showing: There must be sufficient ‘cautionary language or risk disclosure [such] that
19 reasonable minds could not disagree that the challenged statements were not misleading.’” *In re*
20 *Am. Apparel, Inc. S’holder Litig.*, 855 F. Supp. 2d 1043, 1072 (C.D. Cal. 2012) (“*Am. Apparel*
21 *I*”); Dkt. No. 139 at 12 & n.9; Dkt. No. 142 at 4 & n.5. In other words, “the cautionary statement
22 must discredit the alleged misrepresentations to such an extent that ‘the risk of real deception
23 drops to nil.’” *In re Immune Response Sec. Litig.*, 375 F. Supp. 2d 983, 1033 (S.D. Cal. 2005).

24 ⁴³ *Cutera*, 610 F.3d at 1111-13, does not address whether statements that are alleged to be
25 misleading as a result of a defendant’s material omissions are protected by the safe harbor.
26 Moreover, this is not a projections case like *Cutera*, where the “lawsuit comes down to a claim
27 that the company missed the earnings estimate it announced [three months earlier].” *In re Cutera*
28 *Sec. Litig.*, No. C 07-2128 VRW, slip op. at 20 (N.D. Cal. Sep. 30, 2008) (Abadou Decl., Ex. F).

⁴⁴ *In re CV Therapeutics, Inc. Sec. Litig.*, 2004 U.S. Dist. LEXIS 17419, at *33-34 (N.D.
Cal. 2004); *Providence v. Aeropostale, Inc.*, 2013 U.S. Dist. LEXIS 44948, at *31-32, 37-38, 44
(S.D.N.Y. 2013) (“the safe harbor does not apply to material omissions”).

Here, Defendants have not made the required “stringent showing.” *Provenz v. Miller*, 102 F.3d 1478, 1493 (9th Cir. 1996); *Amylin*, 2003 U.S. Dist. LEXIS 7667, at *20.

Cautionary language is not meaningful when it warns of risk factors that were not merely hypothetical but were in fact already occurring. *See Rosenbaum Capital, LLC v. McNulty*, 549 F. Supp. 2d 1185, 1191 (N.D. Cal. 2008); *Countrywide*, 588 F. Supp. 2d at 1178 n.62. Here, HP’s warnings that: (i) “[t]here is a risk that HP will be unable to successfully execute this transformation;” (ii) “during the course of our due diligence, we may not identify all of the factors necessary to estimate our costs accurately;” or (iii) HP “may be required to incur additional material charges relating to the impairment of those assets,” (Dkt. No. 141 at 2-9) were not only vague, boilerplate language that could be found in any company’s warnings in connection with an acquisition, but they also failed to disclose current facts necessary to make them not misleading (*i.e.*, that various whistleblowers had accused Autonomy of being an outright fraud).

C. Defendants Failed to Disclose Material Information During the Class Period

1. Whitman and Lane Failed to Disclose that They Tried to Rescind the Offer While Simultaneously Making Positive Statements About Autonomy

After HP announced its offer, Lane and Whitman instructed HP’s financial advisors to see whether HP could back out of the deal in September 2011.⁴⁵ ¶¶69-73, 178; *see Dodona I, LLC v. Goldman, Sachs & Co.*, 847 F. Supp. 2d 624, 643-44 (S.D.N.Y. 2012) (defendant’s “sudden – and prescient – shift” “supports the inference that it possessed some unique insight”).⁴⁶ These

⁴⁵ HP argues that the Complaint “pleads no facts showing [] Lane had any reason, or motive, to get HP out of the transaction.” Dkt. No. 133 at 15. To the contrary, the Complaint alleges that Lane was aware of the severe negative market reaction to the proposed deal. ¶¶7, 68. Thereafter, he learned that HP had drastically overpaid for Autonomy. Lane argues that, even if HP attempted to withdraw, it could have been the result of negative market reaction – not the price. Dkt. No. 131 at vii-viii, 8. The negative market reaction, however, was to the price (given, among other things, the numerous concerns about Autonomy’s accounting). ¶¶45-46.

⁴⁶ Whitman and Lane argue that they are not liable under Rule 10b-5(a) or (c) because the Complaint has no allegations of conduct beyond misrepresentations and omissions. Dkt. No. 139 at vi, 14; Dkt. No. 131 at 12, n.7. As their own authority makes clear, however, a defendant may “be liable as part of a fraudulent scheme based upon misrepresentations and omissions under Rules 10b-5(a) or (c) when the scheme also encompasses conduct beyond those misrepresentations.” *SEC v. Mercury Interactive, LLC*, 2011 U.S. Dist. LEXIS 134580, at *6 (N.D. Cal. 2011) (quoting *WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d

1 allegations are pled with sufficient particularity and should be accepted as true. *Compare* Dkt.
2 No. 139 at 12; Dkt. No. 131 at vii, 7-8; Dkt. No. 133 at 15 with ¶¶32-43, 68-73, 102; *Tellabs*, 551
3 U.S. at 326.⁴⁷ And, although the Complaint cogently alleges that Lane and Whitman were told
4 by HP’s due diligence advisors that the City Code made withdrawing the offer impossible (¶¶68-
5 73), HP and Lane now claim that the Complaint “misconstrues” and “offers a confusing (and
6 inaccurate) dissertation” on the City Code because the material adverse change condition
7 provision in the HP/Autonomy offer agreement allowed cancellation. Dkt. No. 131 at 8; Dkt.
8 No. 133 at 15-16. There is nothing the least bit “confusing” about Plaintiff’s “dissertation” on
9 City Code law. In fact, *Autonomy’s* own U.K. lawyers, experts in the City Code, published “A
10 Guide to Takeovers in the United Kingdom,” in September 2011 confirming Plaintiff’s
11 understanding of U.K. law as follows:

12 The Panel has ruled that ***for an offeror to invoke a material adverse change***
13 ***condition***, and so withdraw its offer, the offeror is required to demonstrate to the
14 Panel that circumstances have arisen affecting the target which could not have
15 reasonably been foreseen at the time of the announcement of the offer and which
16 are of an entirely exceptional nature. ***Failure to identify a specific liability of the***
target group in the course of due diligence before the offer is made would not
normally provide grounds on which subsequently to withdraw an offer.

16 Abadou Decl., Ex. A; *see* OFFER BY WPP GROUP PLC (“WPP”) FOR TEMPUS GROUP
17 PLC (“TEMPUS”), UK Panel Statement 2001/15 (Nov. 6, 2001) (“For an offeror to invoke a
18 material adverse change condition and so withdraw its offer requires, in the opinion of the Panel,
19 the offeror to demonstrate to the Panel that exceptional circumstances have arisen affecting the
20 offeree company which could not have reasonably been foreseen at the time of the
21 announcement of the offer.”); *Steward Int’l Enhanced Index Fund v. Carr*, 2010 U.S. Dist.
22 LEXIS 5047, at *10-19 (D.N.J. 2010); ¶¶39, 43, 69-73.

23 That HP was attempting to withdraw its offer in September 2011 is further supported by
24 Defendant Lynch’s post-Class Period accusations against his former colleagues at HP. ¶102. In
25 1039, 1057 (9th Cir. 2011)). Here, Whitman and Lane, while reassuring jittery investors that
26 Autonomy was the right strategy for HP, engaged in conduct to withdraw the offer. ¶¶68-73.

27 ⁴⁷ Defendants did not, as they argue, voluntarily choose to launch an investigation and
28 disclose HP/Autonomy’s misconduct. Dkt. No. 139 at vi, 1, 4, 9; Dkt. No. 131 at 12 & n.6; Dkt.
No. 133 at 22, 24. Rather, the Complaint alleges that the May 2012 whistleblower compelled
them to.

1 November 2012, Lynch rhetorically asked HP to explain whether it “approach[ed] the UK
2 Takeover Panel at any stage in an attempt to rescind its offer to buy Autonomy before
3 completion? If so what was the reason it gave and ***why was this material change of view not***
4 ***communicated to shareholders?***” *Id.* As alleged in the Complaint, Defendants’ Lane and
5 Whitman’s conduct was even more egregious than Lynch has suggested because they did not just
6 fail to communicate their “change of view” to HP’s shareholders but, rather, after they
7 discovered that they could not withdraw their offer, they began defending the deal to investors.
8 For example, on September 22, 2011, Lane misrepresented that HP bought Autonomy for
9 “market price,” ¶178,⁴⁸ and Whitman represented that “the [Autonomy] strategy is right, the
10 initiatives that we undertook on August 18 [2011] are right...” ¶177.⁴⁹

11 Defendant Whitman claims that these statements were immaterial as a matter of law, Dkt.
12 No. 139 at vi, 11, even though they were made in response to specific analyst questions and that
13 she expressed her support for a acquisition that had garnered significant investor concern. *See*
14 *Warsaw*, 74 F.3d at 960. Moreover, these statements are actionable for the added reason that
15 Whitman failed to disclose HP’s efforts to withdraw the offer. *See Providence*, 2013 U.S. Dist.
16 LEXIS 44948, at *41-42 (“rosy predictions that might otherwise be puffery are rendered

17 ⁴⁸ Lane’s statement was misleading, not only because he withheld the fact that he had
18 attempted to withdraw HP from the deal, but also because he was aware, *inter alia*, that:
19 (i) numerous analysts and commentators thought that those reported numbers were improperly
20 inflated; (ii) Autonomy had strong-armed Lane into raising HP’s offer above that original offer
21 price; (iii) Autonomy had stymied HP’s due diligence; and (iv) that Lesjak vigorously opposed
22 the deal at a meeting that Lane attended. Dkt. No. 131 at 3-4. Thus, the Complaint does not
23 plead his scienter collectively. Dkt. No. 131 at 10, n.4. This is also not a case like *In re*
24 *VeriSign, Inc. Deriv. Litig.*, 531 F. Supp. 2d 1173, 1206 (N.D. Cal. 2007) where half of the
25 defendants joined the Board ***after*** the alleged fraudulent transaction and, for the other half, the
complaint merely alleged that the director defendants collectively “disseminated or approved
financial statements that did not disclose the [] practices that were occurring....” Dkt. No. 131 at
v., 9-10 & n.4. In *In re Adecco S.A.*, 371 F. Supp. 2d 1203, 1218 (S.D. Cal 2005), “the
Complaint group[ed] all individual Defendants together to claim that they all knew” because the
problem was “well known throughout the Company.”

26 ⁴⁹ In Whitman’s authorities, there were no facts alleged that the misleading statements were
made in response to specific analyst questions and market concerns, or that they were misleading
as a result of material omissions. *Wenger v. Lumisys, Inc.*, 2 F. Supp. 2d 1231, 1246 (N.D. Cal.
1998); *In re Wet Seal, Inc. Sec. Litig.*, 518 F. Supp. 2d 1148, 1167-68 (C.D. Cal. 2007); *In re*
27 *Cybershop.com Sec. Litig.*, 189 F. Supp. 2d 214, 232 (D.N.J. 2002); *In re Foundry Networks, Inc.*
28 *Sec. Litig.*, 2003 WL 22077729, at *8 n.9 (N.D. Cal. 2003).

1 problematic for [] material omissions”). Defendants’ claim that Plaintiff must plead actual
2 knowledge or a subjective belief that their statements were false. Dkt. No. 131 at vii,⁵⁰ 1, 5-6;
3 Dkt. No. 133 at 7-8, 27.⁵¹ Even if actual knowledge were required, as detailed above, Defendants
4 Lane and Whitman were aware of numerous red flags pointing to the conclusion that HP’s
5 acquisition of Autonomy was, in Lesjak’s words “not in the best interests of the Company.”
6 ¶¶15-25, 32-33; *see In re BP Prudhoe Bay Royalty Trust Sec. Litig.*, 2007 U.S. Dist. LEXIS
7 83007, at *19-20 (W.D. Wash. 2007) (actual knowledge pled where defendants were “aware of
8 the numerous red flags”); *Amgen*, 544 F. Supp. 2d at 1027-29.

9 **2. Defendants Are Liable For Their February and March 2012** 10 **Misrepresentations**

11 On February 22, 2012, the Complaint alleges that HP announced that its software license
12 revenue grew just 12%, well below its 23.5% average for the four quarters leading up to the
13 Autonomy acquisition. ¶¶77-78, 184. Despite Defendants’ previous representations about
14 Autonomy’s stellar license revenue growth, HP’s license revenue actually *contracted* after
15 adding Autonomy. *Id.* Based on Apotheker’s August 18, 2011 and September 22, 2011
16 representations, analysts had expected HP’s software margins to spike with the addition of
17 Autonomy’s purported 40-50% margins but HP’s software margins actually decreased in 1Q10 –
18 falling well short of analysts’ expectations. ¶¶77-78. The Complaint alleges that
19 HP/Autonomy’s poor results were the direct consequence of HP’s attempts to end Autonomy’s
20 improper revenue recognition practices. ¶¶74-79. Defendants argue that Plaintiff’s allegations
21 are unsupported. Dkt. No. 133 at 35; Dkt. No. 127 at 9. Not so.

22 In fact, the Complaint alleges that after HP spent months scouring Autonomy’s books and
23 revenue recognition policies in October 2011 to “optimize” them under U.S. GAAP, Autonomy
24 suddenly stopped reporting the same sales growth and high margins that it had previously

25 ⁵⁰ Lane’s in-circuit authority is distinguishable. Dkt. No. 131 at vii, 1, 5-7. In *McKesson*,
26 126 F.2d at 1264, for instance, the statement at issue was a “fairness opinion” by a third party
27 advisor. Dkt. No. 133 at 8, 27.

28 ⁵¹ *Virginia Bankshares v. Sandberg*, 501 U.S. 1083, 1092-94 (1991) holds that statements of
belief or opinions can be materially misleading whenever they are not supported by the
underlying facts. *C/f* Dkt. No. 133 at 7-8, 27.

1 reported for at least 3 consecutive years. ¶¶75, 100, 164. Defendants offer no explanation for
2 how an entity that, according to HP, had previously reported over 50% of its revenues improperly
3 could suddenly cease engaging in those practices without any detection by HP. HP recklessly
4 failed, until November 2012, to consider Autonomy's impairment of the \$6.8 billion of goodwill
5 and \$4.6 billion of purchased intangible assets that HP falsely reported during the Class Period as
6 a result of acquiring Autonomy. ¶¶15-25, 32-43, 45-56, 60-90, 93-96, 100-03. HP, which
7 included Autonomy within its HP Software Segment, reported total goodwill of \$14.1 billion at
8 October 31, 2011, of which Autonomy comprised 47%. The Complaint alleges that HP gradually
9 wrote off accounts receivable and deferred revenue during the Class Period that it knew was
10 uncollectible and/or improperly recorded in an effort to address the problems at HP/Autonomy,
11 and falsely misrepresented its accounting policy disclosure for revenue recognition in connection
12 with Autonomy's accounting improprieties. ¶¶140, 145.

13 Because HP knew and/or recklessly disregarded that Autonomy's financial statements
14 were materially false and misleading after the acquisition closed on October 3, 2011, HP could
15 not accurately justify the fair value it assigned to Autonomy's intangible assets in HP's 2011
16 Annual Report. ¶¶141-43. HP's due diligence team, which purportedly performed "extensive"
17 due diligence on Autonomy, either learned of, or recklessly disregarded, that Autonomy was
18 mischaracterizing low margin hardware revenue estimated to have comprised 10-15% of
19 Autonomy's revenue. Indeed, on November 20, 2012, HP admitted that, for 2009 and 2010,
20 PwC's investigation had concluded that Autonomy had mischaracterized **\$160 million to \$245**
21 **million** of revenue and a similar amount related to cost of sales to artificially distort Autonomy's
22 gross profit. ¶141. Now, according to HP, neither HP's due diligence, HP's purported
23 integration efforts nor its in-house Chief of Software Revenue Recognition was able to detect,
24 until six months after HP initiated its investigation into the May 2012 whistleblower,
25 Autonomy's improper accounting practices. ¶¶36-39, 74-84. Implausible.

26 Defendants also now argue that Plaintiff has not pled specific transactions related to
27 Autonomy's fraudulent revenue practices during this period. Dkt. No. 139 at 14; Dkt. No. 133 at
28 30. Plaintiff's allegation, however, is not that particular revenue figures in HP's financial

1 statements were materially false, but rather that HP's efforts to unwind Autonomy's improper
2 accounting practices are probative of Defendants' scienter.⁵² When HP was caused to report its
3 1Q10 Software results, for instance, it failed to disclose that HP was unwinding Autonomy's
4 aggressive revenue recognition practices. ¶186.⁵³ Instead, on February 22, 2012, Whitman and
5 Lesjak falsely reassured investors that "[t]he Autonomy acquisition is going well" and that HP
6 was "pleased with the Autonomy acquisition." ¶185.⁵⁴

7 The Complaint adds that Defendant Whitman and Lesjak held quarterly business
8 meetings with Autonomy management to discuss Autonomy's financial performance during the
9 Class Period, including at the end of 1Q10. ¶¶111, 114. Given that "the former management of
10 Autonomy began alerting [] Whitman as early as December 2011 to significant problems with the
11 integration of Autonomy into HP that were negatively impacting its performance," ¶102, the

12
13 ⁵² In the authorities HP relies on, the financial statements were alleged to be materially false
14 and misleading solely due to the vague accounting violations alleged there. Dkt. No. 133 at 19,
15 24, 31. *Lapiner v. Camtek, Ltd.*, 2011 U.S. Dist. LEXIS 9985, at *2 (N.D. Cal. 2011); *In re*
16 *Hansen Natural Corp. Sec. Litig.*, 527 F. Supp. 2d 1142, 1146 (C.D. Cal. 2007). *Tripp v.*
17 *Indymac Fin. Inc.*, 2007 WL 4591930, at *5 (C.D. Cal. 2007), involved allegations that the
company had inadequately hedged against risks and, in *In re Remec, Inc. Sec. Litig.*, 415 F. Supp.
2d 1106, 1118 (S.D. Cal. 2006), the court found that one improper transaction ten months before
the class period did not support that the company consistently engaged in the practice during the
class period. Dkt. No. 133 at 30.

18 ⁵³ HP's deferred revenue write-downs further support an inference of scienter because they
19 demonstrate Defendants' knowledge that Autonomy's revenues were uncollectible and/or
20 improperly recorded. ¶¶140, 145-47, 182. In fact, the sales to fictitious customers that HP
21 accused Autonomy of would have resulted in uncollectible deferred revenues. ¶146. Lesjak
22 counters that three quarters of write-downs were necessary as a result of converting Autonomy
from IFRS to GAAP. Dkt. No. 136 at 11. The PSLRA, "in no way turns FRCP 12 into a trial-
type, papers-only proceeding, much less one in which defendants get the benefit of every
conceivable doubt, including credibility calls. That is reserved for the jury." *LDK Solar*, 584 F.
Supp. 2d at 1260.

23 ⁵⁴ Whitman and Lesjak's statements were material. *See S. Ferry*, 399 F. Supp. 2d at 1129-
24 30 (where defendants "highlighted the importance of [the company's] ability to integrate its
25 acquisitions...a reasonable investor would assign some importance to [defendant's] reference to
26 [the company's] past systems integration experience"); Dkt. No. 136 at 10 & n.15; Dkt. No. 139
27 at 11. Even if they were statements of optimism, Plaintiff has pled that Defendants had no
28 reasonable basis for making them. In Defendants' authorities, by contrast, the plaintiffs did not
"demonstrate [defendant's] lack of belief in or lack of a reasonable basis for what he was
asserting, nor do they demonstrate [defendant's] knowledge of undisclosed facts seriously
undermining the statements' accuracy." *Wozniak v. Align Tech.*, 850 F. Supp. 2d 1029, 1037
(N.D. Cal. 2012); *see In re LeapFrog Enters., Inc. Sec. Litig.*, 527 F. Supp. 2d 1033, 1050 (N.D.
Cal. 2007).

1 Complaint does not merely contain, as Defendants now suggest, “general allegations” of
2 Defendants’ “attendance at meetings.” *Daou*, 411 F.3d at 1022. Rather, it alleges that
3 Defendants Whitman and Lesjak were having direct conversations with HP/Autonomy’s senior
4 executives at the same time they were being alerted to significant problems with Autonomy’s
5 integration into HP that were negatively impacting HP’s software performance. *Id.* Dkt. No. 139
6 at 5, n.5; Dkt. No. 136 at 3 & n.4; Dkt. No. 133 at 21. These undisclosed facts, that were
7 contemporaneously known to them, directly contradicted Whitman’s and Lesjak’s
8 representations. *Compare* Dkt. No. 133 at 34; Dkt. No. 139 at 13, n.10.⁵⁵

9 **3. Defendants’ Post-May 2012 Statements Are Actionable By Omission**

10 In May 2012, a “senior member of Autonomy’s leadership team,” raised serious
11 accounting improprieties at HP/Autonomy with HP’s GC Schultz. ¶80. Schultz then informed
12 Whitman, who hired PwC to do an investigation into his allegations. *Id.*⁵⁶ Defendants not only
13 knowingly concealed this material development from investors for the duration of the Class
14 Period but, over the next six months, they repeatedly blamed Autonomy’s woes on “scaling”
15 problems and told investors that they continued to have “every confidence that Autonomy will be
16 a very big and very profitable business.” ¶¶191, 194, 207-08. Their omissions created “an
17 impression of a state of affairs that differ[ed] in a material way from the one that actually

18 ⁵⁵ Defendants rely heavily on the Ninth Circuit’s opinion in *Ronconi v. Larkin*, 253 F.3d
19 423, 432 (9th Cir. 2001). Dkt. No. 139 at 6; Dkt. No. 127 at 9; Dkt. No. 142 at 3; Dkt. No. 133 at
20 9, 12-13, 35. In *Ronconi*, plaintiffs attempted to plead that defendants’ statements regarding a
21 merger were false because defendants were experiencing “significant problems” and “continuing
22 difficult problems” but “[n]owhere...state[d] what these ‘significant’ or ‘difficult’ problems
23 were.” *Id.* at 432. There were no allegations in *Ronconi* that the acquired company was a fraud
24 but, rather, simply that the merger was “not as productive a maneuver as [defendants] had
25 hoped.” *Id.* at 434. In *In re Tibco Software, Inc.*, 2006 U.S. Dist. LEXIS 36666, at *70-71 (N.D.
26 Cal. 2006), CW statements that software remained separate until December were not inconsistent
with defendants’ allegedly false statement, in late December, that integration was complete. Dkt.
No. 133 at 34. In *Kane v. Madge Networks N.V.*, 2000 WL 33208116 (N.D. Cal. 2000), the court
found that allegations that an acquisition was being successfully integrated not actionable where
plaintiff did not plead with particularity that a key executive was planning to leave. Dkt. No. 139
at 11; Dkt. No. 133 at 34; Dkt. No. 136 at 10, n.15. Here, Defendants concealed that hundreds of
employees, including major Autonomy executives, had departed.

27 ⁵⁶ HP’s contention that the Complaint does not plead Whistleblower 4 with particularity is
28 without merit. Dkt. No. 133 at 22, 24. The Complaint specifies the exact parties to the
conversation, when it took place, what was discussed, who it was disclosed to, and what specific
steps HP took as a result. ¶80.

1 exist[ed].” *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002); *see Matrixx*,
2 131 S. Ct. at 1322 (“companies can control what they have to disclose under these provisions by
3 controlling what they say to the market”); *In re Apollo Grp. Inc. Sec. Litig.*, 395 F. Supp. 2d 906,
4 920 (D. Ariz. 2005).⁵⁷

5 Defendants now argue that they were not required to disclose the May 2012
6 whistleblower’s allegations under this Court’s ruling in *Yahoo!*, 2012 U.S. Dist. LEXIS 113036.
7 Dkt. No. 139 at 7-8, 13-14, Dkt. No. 133 at 22; Dkt. No. 136 at 8, 10-11. Not so fast. In *Yahoo!*,
8 plaintiffs alleged that defendants failed to disclose problems at Alipay, a subsidiary of Alibaba
9 Group – a Chinese company that Yahoo had invested in. *Id.* at *23. In arguing that defendants’
10 statements had triggered a duty to disclose, plaintiffs there (weakly) pointed to defendants’
11 statements regarding the value of Alibaba.com, an entirely separate subsidiary of Alibaba Group.
12 *Id.* The statement at issue there, however, explicitly qualified that it did “not include estimates of
13 the value of Alibaba’s privately held businesses [*i.e.*, Alipay].” *Id.* In turn, the Court justifiably
14 reasoned that “[i]t is hard to see how a statement that expressly does not value the privately held
15 businesses [*i.e.*, Alipay] affirmatively creates an impression that the value is different in a
16 material way than the actual value.” *Id.* at *31.

17 Here, by contrast, Defendants made specific statements about Autonomy itself which
18 created the misleading impression that Autonomy’s problems were, among other things, merely
19 “scaling” issues that the Company could and would resolve.⁵⁸ ¶¶172, 191-94. On May 23, 2012,

20 ⁵⁷ Defendants were also required to disclose these facts in their From 10-Q’s filed on June 8,
21 2012 and September 10, 2012. ¶¶196-198, 204-209. Item 303 of SEC Regulations S-K requires
22 that companies describe in their quarterly and annual reports “any known trends or uncertainties
23 that have had or that the registrant reasonably expects will have a material favorable or
unfavorable impact on net sales or revenues or income from continuing operations.” 17 C.F.R.
§229.303.

24 ⁵⁸ Defendants’ authority is not to the contrary. In *In re Rigel Pharms., Inc. Sec. Litig., Inter-*
25 *Local Pension Fund GCC/IBT v. Deleage*, 697 F.3d 869, 880-81 (9th Cir. 2012), the Ninth
26 Circuit reasoned that where defendants’ press release explicitly disclosed side effects, the
27 subsequent release of more detailed information “such as a few cases of mild hypertension or
28 some cases...that did not require dose reductions, was not inconsistent.” In *In re NVIDIA Corp.*
Sec. Litig., 2011 WL 4831192, at *11 (N.D. Cal. 2011), there was no indication that defendants
considered the problem material. In *Brody*, 280 F.3d at 1007 defendants disclosed that they had
received “expressions of interest” from potential acquirers when they had received actual offers.
The statements here, by contrast, created an impression that differed materially from what existed

1 for instance, analysts specifically asked whether HP expected Autonomy’s disappointing results
2 to persist, asking whether the “weakness in [Autonomy] revenue...change[] [HP’s] outlook on
3 the business at all[?]” ¶191. In response, Defendant Whitman misleadingly responded that
4 “[w]hen Autonomy turned in disappointing results, [HP] actually did a fairly deep dive to
5 understand what happened there. And in my view, this is not the product. Autonomy is a terrific
6 product. It’s not the market. There is an enormous demand for Autonomy. It’s not the
7 competition...***This is classic entrepreneurial scaling challenges.***” *Id.* She then assured the
8 market that it would just “take [HP] a couple of quarters to work through some of the growing
9 pains.” *Id.* This caused investors to conclude that HP would “do well in the software business,
10 ***given the company’s comments about the strong pipeline for its Autonomy products.***” ¶192.⁵⁹
11 Further, on June 5, 2012, Whitman again represented that “this is the classic case of scaling a
12 business [Autonomy] from start-up to grown up” and unequivocally told investors “I have every
13 confidence that Autonomy will be a very big and very profitable business.... But we needed
14 different leadership to age Autonomy, and by that I mean ***age it kind of like wine.***” ¶194.⁶⁰ *See*
15 *Berson*, 527 F.3d at 985.⁶¹

16
17
18 at the time by misleading the market that Autonomy was having problems (that HP could fix)
with “scaling” when, in fact, Autonomy was effectively a Ponzi-scheme. Dkt. No. 139 at 3.

19 ⁵⁹ Whitman’s statement, made in response to a specific analyst question, is not puffery.
20 Dkt. No. 139 at 11-12. *Ligand.*, 2005 U.S. Dist. LEXIS 44911, at *61-62. Indeed, to the extent
21 the subject was not of importance to HP or the market, it is unclear why the Company’s own
22 CEO would have engaged in a “deep dive” on the issue. None of Whitman’s authorities involve
23 statements which were specific responses to analyst concern. Dkt. No. 139 at 11-12. *Wozniak v.*
Align Tech., Inc., 2011 WL 2269418, at *4 (N.D. Cal. 2011); *LeapFrog*, 527 F. Supp. 2d at 1050;
City of Royal Oak Ret. Sys. v. Juniper Networks, Inc., 880 F. Supp. 2d 1045, 1064 (N.D. Cal.
2012).

24 ⁶⁰ *See also* ¶¶82, 152, 155, 200 (August 22, 2012: “Autonomy still requires a great deal of
25 attention and we’ve been aggressively working on that business” and HP had “a lot of work to do
26 over the next several quarters to improve Autonomy performance.”); ¶204 (September 10, 2012:
“[a]t the time of the Autonomy acquisition in October 2011, the fair value of Autonomy
approximated the carrying value.”).

27 ⁶¹ Nor is this a case like *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049,
1071 (9th Cir. 2008), where the Ninth Circuit found that defendants’ general statements
28 regarding its overall financial health (“revenue projections and anticipated growth”) did not give
rise to a duty to disclose “specific regulatory investigations.” Dkt. No. 133 at 33-34.

1 Despite these facts, Defendants now claim that they were not required to disclose their
2 “investigation” because it wasn’t complete. Dkt. No. 139 at 7-8, 13-14, Dkt. No. 133 at 22; Dkt.
3 No. 136 at 8, 10-11. The portion of *Yahoo!* that Defendants cite for this proposition, however,
4 analyzed defendants’ “duty to correct” prior *truthful* statements that had allegedly become
5 misleading. 2012 U.S. Dist. LEXIS 113036, at *64. Unlike a duty to disclose, liability for
6 failure to “correct” does not arise if the correction is made within a “reasonable time.” *Id.* In
7 *Yahoo!*, defendants made their disclosure just five *weeks* after receiving notice of the problem.
8 *Id.* They proceeded to continuously update the market on the progress of the negotiations,
9 disclosing the final results just two months later. *Id.*⁶² Had the Defendants here remained silent
10 regarding Autonomy, it might be proper to analyze whether they had a duty to disclose the
11 investigation within a “reasonable time.” However, “at the point Defendants chose to speak
12 about [Autonomy], they had a duty to speak fully and truthfully.” *Apollo*, 395 F. Supp. 2d at
13 920. They failed to do so.

14 **D. The Misconduct that HP Accused Lynch of Should Be Imputed to HP**

15 A corporation’s scienter is derived from its employees and agents. *See Allstate Life Ins.*
16 *Co. v. Robert W. Baird & Co., Inc.*, 2010 WL 4581242, at *22 (D. Ariz. 2010). “A complaint
17 that alleges facts giving rise to a strong inference that at least one corporate agent acted with the
18 required state of mind satisfies the PSLRA even if the complaint does not name the corporate
19 agent as an individual defendant or other-wise identify the agent.” *Matrix Capital Mgmt. Fund,*
20 *L.P. v. BearingPoint, Inc.*, 576 F.3d 172, 189-90 (4th Cir. 2009) (collecting cases). “[T]here is
21 no simple formula for how senior an employee must be in order to serve as a proxy for corporate
22 scienter [and] courts have readily attributed the scienter of management-level employees to
23 corporate defendants.” *In re Marsh & McLennan Cos. Sec. Litig.*, 501 F. Supp. 2d 452, 481
24 (S.D.N.Y. 2006) (collecting cases).⁶³

25
26 ⁶² *Higginbotham*, 495 F.3d at 760-61, analyzed whether defendants had fulfilled their *duty*
27 *to correct* within a reasonable time and the reasonable correction there took place within two
months.

28 ⁶³ *See also In re Cadence Design Sys., Inc. Sec. Litig.*, 692 F. Supp. 2d 1181, 1192 n.8 (N.D.
Cal. 2010); *In re CornerStone Propane Partners, L.P. Sec. Litig.*, 416 F. Supp. 2d 779, 791 (N.D.

1 Here, Whitman accused Lynch – who was a top 15 senior executive officer at HP from
2 October 2011 to May 2012 – of committing fraud on November 20, 2012. ¶¶84, 86, 109. On
3 November 20, 2012, HP asserted that “Autonomy was substantially overvalued at the time of its
4 acquisition” as the result of “a *willful* effort on behalf of certain former Autonomy employees
5 [including Defendant Lynch] to inflate the underlying financial metrics of the company *in order*
6 *to mislead investors....*” ¶85. HP claims that *Glazer Capital Mgmt., LP v. Magistri*, 549 F.3d
7 736, 745 (9th Cir. 2008) stands for the proposition that a corporation’s scienter can be imputed
8 only from “those individuals who actually made the false statements.” Dkt. No. 133 at 6, 23.
9 *Glazer*, however, explicitly reserved deciding whether “it might be possible to plead scienter
10 under a collective theory” because “[t]hat issue is not before us.” *Id.*⁶⁴ The issue, however, is
11 squarely before this Court. Since *Glazer*, courts in this district have imputed the scienter of
12 speaking and non-speaking employees to corporate “persons.” For example, recently, in *Curry v.*
13 *Hansen Med., Inc.*, 2012 U.S. Dist. LEXIS 112449 (N.D. Cal. 2012), plaintiffs alleged that the
14 company’s former senior vice president of commercial operations manipulated Hansen’s
15 financial results, thus making it inevitable that false and misleading statements regarding
16 Hansen’s financial condition would be disseminated to investors. *Id.* at *3-4, 6, 12-13. There,
17 defendants disclosed that “an investigation conducted by Hansen’s audit team revealed that the
18 data was concealed from or falsified for Hansen’s accounting department and outside auditor,”

19 Cal. 2005) (Vice President); *In re Lattice Semiconductor Corp. Sec. Litig.*, 2006 U.S. Dist.
20 LEXIS 262, at *37-38, 55-56 (D. Or. 2006) (Controller).

21 ⁶⁴ *Zucco*’s “narrow exception,” 552 F.3d at 1001, pertained to the core operations inference,
22 not whether an employee’s scienter could be imputed to the company. Dkt. No. 133 at 6, n.3; *see*
23 *Glazer*, 549 F.3d at 745 (“[I]n certain circumstances, some form of collective scienter pleading
24 might be appropriate. For instance....”). Nor does the Fifth Circuit’s opinion in *Southland Sec.*
25 *Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 366-67 (5th Cir. 2004) change the analysis:
26 we “look to the state of mind of the individual corporate official or officials who make or issue
27 the statement [] or order or approve its making or issuance, *or who furnish information or*
28 *language for inclusion therein....*” Dkt. No. 133 at 6. Indeed, recently, in *Kerr v. Exobox Techs.*
Corp., 2012 U.S. Dist. LEXIS 7523, at *40 (S.D. Tex. 2012), the court, following *Southland*,
rejected the notion that *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296
(2011) (“*Janus*”) limited the attribution of scienter to those with “ultimate authority” over the
statement: “[t]he Court finds no reason to read *Janus* to limit the liability of the corporation on
grounds of scienter. Exobox ‘made’ the statements contained in the public filings under *Janus*;
Plaintiffs need only assert that Sonfield furnished the information or language for inclusion in
order to attribute his scienter to Exobox.”

1 including information about improper revenue recognition. *Id.* at *4. Despite the fact that the
2 SVP had not “made” statements, the court found the corporation itself liable based on the scienter
3 of its SVP. *Id.* at *3-4, 6, 12-13, 35.

4 Chief Judge Wilken determined that “a corporate entity can be vicariously liable under
5 §10(b) for the fraudulent acts of its officers, if the officers are alleged to have acted within the
6 scope of their employment and for the benefit of the company.” *Hansen*, 2012 U.S. Dist. LEXIS
7 112449, at *36 (citing *In re Cylink Sec. Litig.*, 178 F. Supp. 2d 1077, 1088 (N.D. Cal. 2001)).
8 This is because, “[i]n *Hollinger*, the Ninth Circuit overturned its previous rule that the vicarious
9 liability provisions in certain sections of the Securities Act supplanted the common law doctrine
10 of respondeat superior.” *Hansen*, 2012 U.S. Dist. LEXIS 112449, at *36; *see also Tellabs*, 513
11 F.3d at 708 (“[T]he doctrines of *respondeat superior* and apparent authority remain applicable to
12 suits for securities fraud.”); *In re Parmalat Sec. Litig.*, 594 F. Supp. 2d 444, 450 (S.D.N.Y. 2009)
13 (Kaplan, J.); *McKesson*, 126 F. Supp. 2d at 1277 (Whyte, J.). Applying this standard, *Hansen*
14 found that because a senior vice president “undertook [a] scheme in the scope of his employment
15 [] his scienter is imputed to Hansen through vicarious liability,” even though he did not “make”
16 any statements. *Id.* at *36-37.⁶⁵

17 Similarly, in *Kyung Cho v. UCBH Holdings, Inc.*, 2012 U.S. Dist. LEXIS 123234 (N.D.
18 Cal. 2012), Judge White found that the scienter of UCBH’s Vice President and Manager of
19 Credit Policy could be imputed to UCBH under the doctrine of *respondeat superior*. *Id.* at *28-
20 31.⁶⁶ Plaintiffs alleged that the VP had “engag[ed] in a conspiracy and fraudulent scheme to
21 deceive the investing public and bank regulators by manipulating the Bank’s books and records.”
22 *Cho*, 2012 U.S. Dist. LEXIS 123234, at *28. Thus, “[i]n light of the imputation of [VP’s]

23
24 ⁶⁵ Nor does *Janus* alter this analysis. *See Pa. Pub. Sch. Emps.’ Ret. Sys. v. Bank of Am.*
25 *Corp.*, 2012 U.S. Dist. LEXIS 129529 at *5-6 (S.D.N.Y. Aug. 2012) (“*Janus* does not concern
26 corporate scienter. Rather, *Janus* addresses what it means to ‘make’ a statement for purposes of
[§10(b) and Rule 10b-5]. And there is no dispute that BoA, through its various public filings,
at *39.”); *Kerr*, 2012 U.S. Dist. LEXIS 7523,

27 ⁶⁶ *See also Pa. Pub. Sch. Emps.’ Ret. Sys. v. Bank of Am. Corp.*, 2012 U.S. Dist. LEXIS
28 96317, at *51-53 (S.D.N.Y. 2012) (“[c]ourts routinely impute to the corporation the intent of
officers and directors acting within the scope of their authority”).

1 scienter through respondeat superior, the Court [found] that Plaintiffs [had] sufficiently alleged a
2 primary violation of Section 10(b) and Rule 10b-5 by the Bank.” *Id.* at *31. Likewise, here,
3 Lynch was HP’s Executive Vice President of Information Management and led Information
4 Management (which included the Software Segment), one of HP’s largest divisions. ¶¶45, 73.
5 Because HP itself accused Lynch of knowingly engaging in “serious accounting improprieties,
6 disclosure failures, and outright misrepresentations,” ¶¶5, 8, 84, his scienter should be imputed to
7 HP as a matter of law. ¶109.

8 **E. Defendants’ *Janus* Arguments Lack Merit**

9 Defendant Lynch argues that he is not liable for HP/Autonomy’s Software Division’s
10 results in HP’s SEC filings *that he was responsible for* because he did not “make” those
11 statements under *Janus*. Dkt. No. 125 at 7. He similarly argues that he “cannot be held liable
12 under Section 10(b) for statements made when he was not an officer of HP.” Dkt. No. 125 at 7.
13 Fair enough. He is, however, liable for: (i) statements made when he was an officer of
14 Autonomy and/or HP from October 2011 to May 2012; (ii) the false and misleading statements
15 contained in HP’s joint August 18, 2011 press release with Autonomy, Abadou Decl., Ex. C; ¶44,
16 and (iii) statements made by Defendants Apotheker and Robison relaying Autonomy’s financial
17 results as those statements are attributable to Lynch. ¶¶164, 171-72.

18 “[A]ttribution” that is “implicit from *surrounding circumstances* is strong evidence that a
19 statement was made by” a defendant. 131 S. Ct. 2302-03; *see United States SEC v. Landberg*,
20 836 F. Supp. 2d 148, 154 (S.D.N.Y. 2011) (“[T]he SEC alleges adequate surrounding
21 circumstances for a reasonable fact finder to conclude that the statements alleged to be fraudulent
22 were implicitly attributed to Gould, which is ‘strong evidence’ that Gould was the ‘maker’ of
23 those statements, thereby satisfying *Janus*.”).⁶⁷ As here, “[i]t is not inconsistent with *Janus*
24 *Capital* to presume that multiple people in a single corporation have the joint authority to ‘make’
25 an SEC filing, such that a misstatement has *more than one ‘maker.’*” *City of Pontiac Gen.*
26 *Emps. Ret. Sys. v. Lockheed Martin Corp.*, 875 F. Supp. 2d 359, 374 (S.D.N.Y. 2012); *see In re*
27 *Merck & Co., Sec., Derivative & “ERISA” Litig.*, 2011 U.S. Dist. LEXIS 87578, at *102 (D.N.J.

28 ⁶⁷ *In re Stillwater Capital Partners Inc. Litig.*, 853 F. Supp. 2d 441, 460 (S.D.N.Y. 2012).

2011) (defendant “was at the time of each attributed statement an officer of Merck” who “made the statements pursuant to his responsibility and authority to act as an agent of Merck, not as in *Janus*, on behalf of some separate and independent entity”).

The majority of cases that have found potential liability of corporate insiders involve public statements that have in some way been attributed to a corporate insider, such that the investing public knows that person played a large role in the preparation of the misstatements and is ultimately responsible for them. *See* Jeffries, Browning, “The Implications of *Janus* on Issuer Liability in Jurisdictions Rejecting Collective Scierter,” 43 Seton Hall L. Rev. 491, 513-514 (2013); *see also Hawaii Ironworkers Annuity Trust Fund v. Cole*, 2011 U.S. Dist. LEXIS 98769 at *17-22 (N.D. Ohio 2011).⁶⁸ During the Class Period, HP made it abundantly clear that Defendant Lynch was responsible for its Software Division’s financial results. ¶¶45, 73.

Upon the completion of the acquisition, HP immediately named Lynch as one of HP’s top 15 executive officers. ¶¶45, 73. Lynch continued to lead Autonomy within HP, ¶45, and HP acknowledges that Lynch was responsible for those results. *See* Dkt. No. 139 at 2 (“Lynch again failed to meet license revenue projections for Autonomy”); *id.* (“[Lynch’s first full quarter leading Software, Q1 FY2012, ended with mixed results.”).⁶⁹ Indeed, according to HP, Defendant Lynch was fired because *he* did not deliver positive results for HP’s Software Division. ¶80. It is fair to conclude, therefore, that Lynch had “ultimate authority” over the results of HP’s Software division, which the Complaint alleges were false and misleading when

⁶⁸ Lynch argues that *Janus* “rejected a definition of ‘make’ that ‘would permit private plaintiffs to sue a person who ‘provides the false or misleading information that another person then puts into the statement.’” Dkt. No. 125 at 7. *But see In re Allstate Life Ins. Co. Litig.*, 2012 U.S. Dist. LEXIS 72900, at *12-15 (D. Ariz. 2012) (under *Janus*, defendant “made” statements even though they “were not made directly to Plaintiffs, but rather were, with [defendant’s] knowledge, incorporated into the Official Statements”).

⁶⁹ *Compare with* Dkt. No. 133 at 21 (Lynch “is not alleged to have had any role in HP’s post-acquisition accounting”); Dkt. No. 125 at 7 (“[N]or do Plaintiffs allege that [] Lynch ever participated in preparing either the financial statements or any of the public statements made by HP”).

made. *See In re Pfizer Inc. Sec. Litig.*, 2013 U.S. Dist. LEXIS 49333, at *38-40 (S.D.N.Y. 2013);⁷⁰ ¶¶73, 109, 119-20, 123, 134, 145, 149-50.⁷¹

Finally, despite their arguments to the contrary, Defendants Whitman's, Lesjak's, Apotheker's and Lane's "signatures on documents containing allegedly false representations is sufficient" to satisfy *Janus*. Compare *In re Am. Apparel, Inc. S'holder Litig.*, 2013 U.S. Dist. LEXIS 6977, at *90 (C.D. Cal. 2013) ("*Am. Apparel II*") with Dkt. No. 139 at 3 & n.3; Dkt. No. 131 at 4. ¶¶111-15. See also *Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp.*, 2011 U.S. Dist. LEXIS 93873, at *3 (N.D. Ala. 2011); *Merck & Co.*, 2011 U.S. Dist. LEXIS 87578, at *102 (individual defendants liable where each "was at the time of each attributed statement an officer of Merck," who "made the statements pursuant to his responsibility and authority to act as an agent of Merck, not as in *Janus*, on behalf of some separate and independent entity"); *SEC v. Das*, 2011 U.S. Dist. LEXIS 106982, at *18 (D. Neb. 2011).⁷²

F. HP/Autonomy's Goodwill Statements Were Materially False and Misleading When Made

During the Class Period, HP issued financial statements and related earnings releases for the fiscal year ended October 31, 2011, and for each of its first three quarters of fiscal year ended

⁷⁰ Lynch argues that Plaintiff cannot show reliance because he did not make a statement that: (1) could be relied upon; or (2) gave rise to a duty to disclose, Dkt. No. 125 at 8-9, even though he "made" actionable statements under *Janus*.

⁷¹ The Complaint does not, as Defendant Lynch glibly suggests, merely recite his title and date of employment. Dkt. No. 125 at 1, 5, 6 & n.4, 8, 9. Rather, it alleges that he was the architect of Autonomy's fraudulent accounting practices and was motivated to cash out of Autonomy before it collapsed under the weight of that fraud. ¶¶6, 30. In addition, HP has accused Defendant Lynch of engaging in "serious accounting improprieties, disclosure failures, and outright misrepresentations." ¶¶5, 84. CW1 also confirmed Lynch's participation in Autonomy's fraud. ¶52. Lynch's authority does not compel the opposite conclusion. *Castaneda v. Saxon Mortg. Servs.*, 687 F. Supp. 2d 1191, 1200 (E.D. Cal. 2009), analyzed claims of common law fraud under California law. *Swartz v. KPMG LLP*, 476 F.3d 756, 765 (9th Cir. 2007), required that the complaint "identif[y] the role of [each] defendant[] in the alleged fraudulent scheme," a burden which has clearly been met here. In *Philco*, 2011 WL 4595247, at *8, defendant was not accused of making "outright misrepresentations" by his employer. Dkt. No. 125 at 9.

⁷² Apotheker argues that he not liable for repeating Autonomy's financial misrepresentations because he was not the person with ultimate authority over the statements. Dkt. No. 127 at 11. But "[o]ne 'makes' a statement by stating it." *Janus*, 131 S. Ct. at 2302.

1 October 31, 2012, that were materially misstated in violation of GAAP and SEC regulations
2 because Defendants: (i) failed to record an impairment loss for goodwill and purchased intangible
3 assets in connection with the Autonomy Acquisition, which resulted in a material overstatement
4 of the Company's reported assets by at least \$5.7 billion for goodwill and \$3.4 billion for
5 purchased intangible assets; (ii) materially misrepresented HP/Autonomy's revenue recognition
6 policies; (iii) failed to disclose that a material amount of the deferred revenue acquired in the
7 Autonomy Acquisition was improperly recorded; (iv) materially misrepresented HP/Autonomy's
8 disclosures for the Software Segment; and (v) failed to disclose known trends and uncertainties in
9 HP Software Segment, which included Autonomy.

10 Defendants argue that Plaintiff cannot establish the falsity of HP's goodwill statements
11 because the Complaint merely alleges "fraud by hindsight."⁷³ Dkt. No. 133 at 21, 26, 31-32; Dkt.
12 No. 139 at 6, 14; Dkt. No. 136 at v, 1. HP knew in May 2012 that Autonomy had material
13 accounting improprieties. At the very latest, at that date, HP questioned the value they had
14 previously assigned to Autonomy's goodwill. The discovery of an accounting fraud at Autonomy
15 is a change in "events [or] circumstances" as specified under GAAP. ¶162. After being armed
16 with knowledge of an accounting fraud at Autonomy, during the Class Period, HP continued to
17 issue their April 30, 2012 Quarterly Report on Form 10-Q (filed on June 8, 2012) and their July
18 31, 2012 Quarterly Report on Form 10-Q (filed on September 10, 2012) that reported goodwill
19 and purchased intangibles at full value without any disclosure of the potential impairment or
20 actual impairment. This is not "fraud by hindsight."

21 The Complaint describes how HP's Worldwide Director of Software Revenue recognition
22 undertook a detailed study of Autonomy's revenue recognition practices. ¶75. By December
23 2011, HP had engaged E&Y and KPMG to undertake "detailed studies of Autonomy's software
24 revenue recognition with a view to optimizing for U.S. GAAP."⁷⁴ *Id.* HP's own "Critical

25 ⁷³ In *In re Connectics Corp. Sec. Litig.*, 542 F. Supp. 2d 996, 1005 (N.D. Cal. 2008), the
26 Complaint "rel[ies] entirely on another complaint as the sole basis for [its] allegations." Dkt. No.
27 133 at 16. Moreover, the allegations stemming from the *Briody* matter are based almost entirely
on internal Autonomy e-mails, not simply another complaint's allegations.

28 ⁷⁴ Despite this, HP claims that nobody noticed that "critical documents" were missing "from
the obvious places" at Autonomy. ¶87. HP offers no explanation, however, for why its extensive

Accounting Policies and Estimates,” assured investors that the Company “evaluate[s] goodwill and indefinite-lived intangibles on an annual basis as of the beginning of its fourth fiscal quarter or whenever events, changes in circumstances or changes in management business strategy indicate that there may be a potential indicator of impairment.” ¶144. Despite these allegations, Defendants argue that Plaintiff pleads no facts that they could have uncovered Autonomy’s improper recognition of revenue which totalled 50% in 2009 and 2010.⁷⁵ Dkt. No. 136 at 7; Dkt. No. 133 at 18; ¶44, n.21, 137.

Defendants’ reliance on the Ninth Circuit’s *en banc* decision in *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1549 (9th Cir. 1994) is unavailing. In *GlenFed*, the Ninth Circuit found falsity *adequately pled* even though it noted that, like goodwill, the loan loss reserves were “permissible judgments” that “are based on flexible accounting concepts, which, when applied, do not always (or perhaps ever) yield a single correct figure.” *Id.* Defendants argue that more is required here because their goodwill statements involved judgment. Dkt. No. 136 at 9 & n.12; Dkt. No. 133 at 20-21, 31-33; Dkt. No. 139 at 5; *see In re Pilgrim’s Pride Corp. Sec. Litig.*, 2010 U.S. Dist. LEXIS 84260, at *2-9, *102-103 (E.D. Tex. 2010) (falsity adequately alleged because defendants failed to test for goodwill impairment in connection with its chicken segment, despite adverse changes in the chicken industry including increasing cost of feed ingredients and weak market demand and negative cash flows from operations); *In re Citigroup, Bond. Litig.*, 2010 U.S. Dist. LEXIS 69257, at *67-68 (S.D.N.Y. 2010).

Next, HP cites *In re Remec, Inc. Sec. Litig.*, 388 F. Supp. 2d 1170, 1175 (S.D. Cal. 2005) (“*Remec I*”), claiming that HP’s Autonomy-related goodwill statements were not false when made. Dkt. No. 133 at 32; Dkt. No. 136 at 9; Dkt. No. 139 at 9. Defendants, however, ignore that that court later found that allegations that Remec was assuming high margins and rates of

reviews failed to question that “critical documents” were missing “from [] obvious places.” *Ernst & Young*, 641 F. 3d at 1100-1101 (scienter adequately pled because, “[w]hile the Complaint indicates that [defendant company’s] executives may have attempted to deceive EY, there is an equal inference that EY overlooked significant events without further questioning or investigation”).

⁷⁵ In *Metzler*, 540 F.3d at 1068, by contrast, plaintiffs alleged that defendants were aware of the fact that some campus administrators falsified reports as result of “general awareness of the day-to-day workings of the company’s business” and access to high-level enrollment data.

1 growth in its goodwill analysis “g[a]ve rise to a strong inference that the assumptions underlying
2 the goodwill impairment analys[e]s...were not within the broad realm of objectively reasonable
3 assumptions when viewed in light of [the company’s] then existing financial condition.” *In re*
4 *Remec Inc. Sec. Litig.*, 3:04-cv-01948-MMA-WMC, slip. op. at 5-6 (S.D. Cal. 2006) (“*Remec*
5 *II*”); see Abadou Decl., Ex. G. At summary judgment, the court again denied defendants’ motion
6 as to the falsity of the goodwill statements based on plaintiff’s proffered evidence that goodwill
7 was impaired at the time the challenged statements were made. *In re Remec Inc. Sec. Litig.*, 702
8 F. Supp. 2d 1202, 1227-28 (S.D. Cal. 2010). Importantly, while the court applied *Rubke* to
9 defendants’ statements of optimism, it did not apply *Rubke* to defendants’ goodwill statements.⁷⁶
10 *Id.* at 1227-29, 1245.

11 Here, again, the Complaint alleges that, after months of intensive review of Autonomy’s
12 revenue recognition policies and workpapers, Defendants learned that Autonomy’s “growth” had
13 been based on accounting that was improper under GAAP, thus “giv[ing] rise to a strong
14 inference that the assumptions underlying the goodwill impairment analys[e]s...were not within
15 the broad realm of objectively reasonable assumptions when viewed in light of [the company’s]
16 then existing financial condition.” *Remec II* at 5-6; ¶¶75, 148. This is especially true for
17 Defendants’ goodwill statements in February, March, May, June, August and September 2012
18 (¶¶149-56, 158, 182, 187, 190, 196, 199, 201, 204), after they had considerable time to review
19 Autonomy’s performance.⁷⁷ ¶131; see *IBEW Local 90 Pension Fund v. Deutsche Bank AG*, 2013

20
21 ⁷⁶ Defendants rely on *Rubke v. Capitol Bancorp.*, 551 F.3d 1156 (9th Cir. 2009) even though
defendants cite no case in this Circuit applying *Rubke* to goodwill statements.

22 ⁷⁷ Plaintiffs in *Fait v. Regions Fin. Corp.* 655 F.3d 105, 112 (2d Cir. 2011) “relie[d] mainly
23 on allegations about adverse market conditions to support the contention that defendants should
24 have reached different conclusions about the amount of and the need to test for goodwill,” and, in
25 any event, *Freidus v. Barclays Bank PLC*, 2013 U.S. App. LEXIS 17159, at *21-22 (2d Cir.
26 2013) recently limited *Fait*. In *In re ICN Pharms., Inc.*, 299 F. Supp. 2d 1055, 1064 (C.D. Cal.
27 2004), the only person who allegedly “told” defendants of problems was a “competitor” thus the
28 “information was coming from a party that had divergent interests.” Dkt. No. 133 at 21, 31-32;
Dkt. No. 139 at 5. The plaintiffs in *City of Omaha v. CBS Corp.* alleged only that, at some
undetermined earlier date, the defendants “had knowledge of events or circumstances which
would have required them to reach the conclusion” that they should have performed an
impairment analysis earlier. 679 F.3d 64, 68 (2d Cir. 2012); Dkt. No. 136 at 5 & n.6; Dkt. No.
133 at *20-21, 32-33; Dkt. No. 131 at vii, 1, 5-6. In *In re Int’l Rectifier Corp. Sec. Litig.*, 2008
2008 U.S. Dist. LEXIS 44872 (C.D. Cal. 2008), the corporation and its top finance executives

1 U.S. Dist. LEXIS 43774, at *40-41 (S.D.N.Y. 2013); *see also Amylin*, 2003 U.S. Dist. LEXIS
2 7667, at *25-26; *Stratte-McClure*, 784 F. Supp. 2d at 387 (“where parties maintain high
3 valuations on assets in the face of red flags that the valuations are inaccurate, courts have
4 sustained securities fraud claims”); Dkt. No. 136 at 1-2; Dkt. No. 131 at 4, 9-10; *see also In re*
5 *New Century*, 588 F. Supp. 2d 1206, 1236 (C.D. Cal. 2008) (goodwill misstatements actionable
6 where defendant “simply failed to obtain the necessary evidence to even audit the testing.”).⁷⁸
7 Finally, the Complaint alleges that HP had a heightened awareness that Autonomy’s aggressive
8 revenue recognition practices were a fraud risk because revenue recognition is an assumed fraud
9 risk in the high-margin software technology sector. ¶138 & n.36.

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16 were not, as here, conducting full analyses of the subsidiaries accounting practices. Dkt. No. 136
17 at 2-4. In *In re Acterna Corp. Sec. Litig.*, 378 F. Supp. 2d 561, 574 (D. Md. 2005), the company
18 disclosed that its financial results were so “bleak” that it was testing its goodwill every quarter.
19 Not surprisingly, the court refused to infer that the company had tested its goodwill during one of
20 those quarters (with no allegation that the test had shown impairment). Dkt. No. 136 at 5.
21 Lesjak’s reliance on *Gompper v. VISX, Inc.*, 298 F.3d 893 (9th Cir. 2002) is unavailing after
22 *Tellabs*. *See In re Impac Mortg. Holdings, Inc.*, 554 F. Supp. 2d 1083, 1091 n.4 (C.D. Cal. 2008)
23 (“The Supreme Court’s ruling results in a standard that is slightly more favorable to securities
24 plaintiffs than previously applied by the Ninth Circuit [in *Gompper*]” which required that “it was
25 more likely than not that the defendants’ conduct was fraudulent.”).

26 ⁷⁸ Defendants’ reliance on “clean” audit opinions provides no shelter, Dkt. No. 139 6-7;
27 Dkt. No. 133 at 19, 24, 31, as management, not outside auditors, are responsible for the
28 Company’s financial statements. *See Reves v. Ernst & Young*, 507 U.S. 170, 190-91 (1993);
LDK Solar, 584 F. Supp. 2d at 1246 (denying motion to dismiss where “unqualified [audit]
opinion did not necessarily exonerate [defendant]”). At best, this raises an affirmative defense
that is inappropriate at the motion to dismiss stage. *See Provenz*, 102 F.3d at 1491. Nor is a
restatement necessary to plead scienter. “To hold otherwise would shift to accountants the
responsibility that belongs to the courts” and allow Defendants “to exercise an unwarranted
degree of control over whether they are sued, because they must agree to a restatement.”
Aldridge v. A.T. Cross Corp., 284 F.3d 72, 83 (1st Cir. 2002); *see also LDK Solar*, 584 F. Supp.
2d at 1245. In *In re Levi Strauss & Co. Sec. Litig.*, 527 F. Supp. 2d 965, 987-88 (N.D. Cal. 2007),
“the court agree[d]...**that the lack of restatement or an unqualified independent auditor’s**
opinion does not absolve or shield a defendant from liability” but found that plaintiffs “failed to
plead facts suggesting improper accounting.” Dkt. No. 133 at 31.

1 **G. Additional Facts Pled in the Complaint Buttress Plaintiff's Scienter**
2 **Allegations**

3 **1. Plaintiff's Motive Allegations Are Cogent and Compelling**

4 As set forth in the Complaint, Defendants' motivations, though varied, combined to
5 perpetrate a fraud on HP's investors.⁷⁹ ¶¶6, 10-14, 16-41, 43, 45-47, 50-56, 58-61, 68-77, 79-80.
6 HP argues that the allegations regarding HP's history of leaks, Board turmoil and Apotheker's
7 "transformational" corporate strategy should be disregarded. *Compare* Dkt. No. 133 at 3, n.1
8 with ¶¶10-14, 34, 219 n.44. In *In re Harmonic, Inc., Sec. Litig.*, 2006 U.S. Dist. LEXIS 90450, at
9 *50-57 (N.D. Cal. 2006), which HP cites in support of its argument, the allegations were stricken
10 because they were fraud allegations repeated from a complaint that had been previously
11 dismissed and which plaintiffs had expressly disclaimed for purposes of the non-fraud Securities
12 Act claims at issue there. Dkt. No. 133 at 3, n.1.⁸⁰

13 Defendants claim that the stronger inference here is that, for an entire year, they were
14 blissfully unaware of Defendant Lynch's misconduct. Dkt. No. 142 at 1; Dkt. No. 139 at vi, 1, 5,
15 9-10; Dkt. No. 136 at v., 1, 3-5; Dkt. No. 133 at 2, 23; Dkt. No. 127 at 2-3, 5-6, 10-11.⁸¹

17 ⁷⁹ Unlike here, in *Slayton v. Am. Express Co.*, 604 F.3d 758, 776 (2d Cir. N.Y. 2010),
18 plaintiffs did "not allege[] *any* theory as to why the defendants would knowingly mislead
19 investors." Dkt. No. 131 at vi, 5, 9. In *Cement Masons & Plasterers Joint Pension Trust v.*
Equinix, Inc., 2012 WL 685344, at *8 (N.D. Cal. 2012), defendants failed to allege a single
20 actionable statement. Dkt. No. 136 at 5.

21 ⁸⁰ In *Higginbotham v. Baxter Int'l, Inc.*, 495 F.3d 753, 758 (7th Cir. 2007), by contrast,
22 there was "no reason at all" to infer defendants' knowledge (or willful blindness) prior to the
23 May 10 statements at issue because "[k]nowledge does not come until May at the earliest." In
24 *Horizon Asset Mgmt. v. H&R Block, Inc.*, 580 F.3d 755, 763 (8th Cir. 2009) the only allegation
25 that defendants were aware of problems was the statement of one confidential witness
26 "contend[ing] that [the defendant] had knowledge of the accounting problems in April 2004, six
27 months before he began working for [the company]." In *Slayton*, 604 F.3d 758, which applied an
28 actual knowledge standard, the fact that defendants had just disclosed the same large losses in the
29 previous quarter negated scienter. Moreover, there were no allegations that defendants knew
30 losses would increase and the sole source of plaintiff's allegations stated the defendants were
31 "stunned" when they learned the truth months later. *Id.* at 775-77. In *re Boston Sci. Corp. Sec.*
Litig., 686 F.3d 21, 29-31 (1st Cir. 2012) stands for the unremarkable proposition that a
32 Company was not required to immediately ascertain and disclose the impact of firing 10
33 members of its 1,100 person sales staff.

34 ⁸¹ In *Coble*, 2002 WL 31093589, at *3, "plaintiffs did not proffer *any* theory as to why
35 defendants would make the[] false statements."

1 Defendants also suggest that there was no reason for them to cover up Autonomy's fraud,
2 because it would come to light eventually. *Id.* That's a jury issue. The Complaint, which should
3 be accepted as true, alleges that Defendants Whitman, Lane and Lesjak opted to quietly clean up
4 the mess Apotheker and Lynch left behind in the hopes that it would never come to light. The
5 "fact that a gamble – concealing bad news in the hope that it will be overtaken by good news –
6 fails is not inconsistent with its having been a considered, though because of the risk a reckless,
7 gamble." *Compare Tellabs II*, 513 F.3d at 710 with Dkt. No. 131 at 5. Defendant's lack of stock
8 sales, Dkt. No. 139 at vi, 1, 8-10; Dkt. No. 142 at 1, 6-7; Dkt. No. 127 at 11; Dkt. No. 136 at 2, 5
9 & n.7; Dkt. No. 131 at 5; Dkt. No. 133 at 2, 25, are meaningless here because "a party that
10 introduces fraudulent information into the securities market does not less damage to the public
11 because the party did not trade stocks." *McGann v. Ernst & Young*, 102 F.3d 390, 396 (9th Cir.
12 1996). "In other words, the lack of stock sales by a defendant is not dispositive of scienter." *Am.*
13 *W. Holding*, 320 F.3d at 944.⁸²

14 **2. Defendants Were "Hands-On" Managers**

15 "[T]he Ninth Circuit [has] held senior management accountable for information about
16 which they claimed to have superior knowledge." *S. Ferry*, 687 F. Supp. 2d at 1259-60; *Tellabs*
17 *II*, 513 F.3d at 711. A complaint therefore adequately pleads scienter where, as here, it contains
18 "specific admissions from top executives that they are involved in every detail of the company
19 and that they monitored portions of the company's database, a specific admission by a top
20 executive that '[w]e know exactly how much we have sold in the last hour around the world,' or
21 other particular 'details about the defendants' access to information within the company.'" *Zucco*,
22 552 F.3d at 1001. Here, Whitman and Apotheker admitted on numerous occasions that
23 they were monitoring every detail about Autonomy's acquisition and/or integration into HP.
24 ¶¶76, 177, 191. *See Nursing Home Pension Fund, Local 144 v. Oracle Corp.*, 380 F.3d 1226,
25 1234 (9th Cir. 2004); *see Plumbers Union Local No. 12 Pension Fund v. Ambassador's Grp.*,

26
27 ⁸² *See also Hanon v. Dataproducts Corp.*, 976 F.2d 497, 507 (9th Cir. 1992); *LDK Solar*,
28 584 F. Supp. 2d at 1247 (absence of insider trading by a defendant did not weigh against
scienter); *Middlesex Ret. Sys. v. Quest Software Inc.*, 527 F. Supp. 2d 1164, 1191 (C.D. Cal.
2007) (same); *Batwin*, 2008 U.S. Dist. LEXIS 52365, at *43-45 (same).

1 717 F. Supp. 2d 1170, 1178-79 (E.D. Wash. 2010); *In re NorthPoint Commc'ns Grp., Inc., Sec.*
2 *Litig. & Consol. Cases*, 221 F. Supp. 2d 1090, 1104 (N.D. Cal. 2002).

3 **3. HP's Autonomy-Related Purge Is Evidence of Scienter**

4 The executive resignations and firings alleged in the Complaint also provide evidence of
5 scienter. *See Adaptive*, 2002 U.S. Dist. LEXIS 5887, at *42-43. On September 22, 2011, before
6 his deal with Autonomy had yet to even close, Apotheker was ousted as HP's CEO. ¶68.
7 Robison, who ran HP's Autonomy due diligence, was terminated just a month after HP began
8 reviewing Autonomy's revenue recognition practices. ¶117. In April 2012, Lynch was removed
9 around the same time that HP claims it became aware of Autonomy's fraud. ¶80. In July 2012,
10 the leader of HP's in-house legal team for the Autonomy acquisition, and who signed the August
11 18, 2011 press release announcing the deal, abruptly resigned his post just within months of the
12 May 2012 whistleblower's allegations. ¶81. In April 2013, after months of pressure following
13 the November 20, 2012 disclosures, Lane was forced to give up his position as Chairman of the
14 Board. ¶221.

15 The Court should find these terminations one of several factors to support an inference of
16 scienter here. *See McKesson*, 126 F. Supp. 2d at 1275 n.16; *In re Alstom SA, Sec. Litig.*, 454 F.
17 Supp. 2d at 187, 208 (S.D.N.Y. 2006). HP's argument that Plaintiff has not proven that Lynch
18 was terminated because HP discovered Autonomy's misconduct is weak, Dkt. No. 133 at 18-19,
19 as in *UTStarcom*, this court reasoned that "the proximity of Defendants' departures to the []
20 investigations adds one more piece to the scienter puzzle." 617 F. Supp. 2d at 975-76. (quoting *In*
21 *re Impax Labs., Inc., Sec. Litig.*, 2007 U.S. Dist. LEXIS 52356, at *26-27 (N.D. Cal. 2007)).

22 **4. The Size of HP's Autonomy Write-Down Supports Scienter**

23 The sheer magnitude of the Company's \$8.8 billion write-down here (85% of the value
24 HP attributed to Autonomy) is further indicia of scienter.⁸³ ¶¶5, 84, 217; *Ernst & Young*, 641 F.

25
26 ⁸³ Lesjak's argument, that she could not be expected to know the accounting details
27 concerning Autonomy, (Dkt. No. 136 at 4), is difficult to square with Whitman's representation
28 that Autonomy would be "HP's priority number one, two and three" in 2012, and HP's three
month intensive review of Autonomy's financial statements and revenue recognition policies.
¶¶74-76.

3d at 1100-1101. On November 20, 2012 HP admitted that \$200 million of Autonomy’s 2009 and 2010 revenue had been recorded improperly or prematurely – over 50% of Autonomy’s revenue for that period. ¶44, n.21, 137. “Although it is possible to infer negligence from these accounting problems, as opposed to scienter, the Court [should] find[] that the magnitude and extent of the problems, as alleged in the Complaint, gives rise to at least an equally strong inference of scienter.” *UTStarcom*, 617 F. Supp. 2d at 975. “Considering the number, magnitude, and multi-year financial impacts of [the violations], it is certainly reasonable to infer scienter just as strongly as an innocent inference.” *Ernst & Young*, 641 F. 3d at 1100-1101.

H. Plaintiff Has Adequately Alleged “Control Person” Liability

“A *prima facie* case of control person liability requires evidence (1) that a primary violation of the securities laws occurred and (2) that defendant directly *or indirectly* controlled the person or entity committing the primary violation.” *New Century*, 588 F. Supp. 2d at 1233. For the reasons stated above, Plaintiff has alleged primary violations of the federal securities laws. “In order to make out a *prima facie* case, it is not necessary to show actual participation or the exercise of actual power....” *Id.*; see also *Everex*, 228 F.3d at 1066.⁸⁴ Plaintiff need not plead a Section 20(a) defendant’s “scienter or ‘culpable participation’ in the alleged wrongdoing.” *Am. Apparel II*, 2013 U.S. Dist. LEXIS 6977, at *122 (citing *Arthur Children’s Trust v. Keim*, 994 F.2d 1390, 1396 (9th Cir. 1993)).⁸⁵ A defendant can be found liable even if

⁸⁴ Defendants repeatedly argue that the Complaint fails to plead that they “exercised” power or control over HP. Dkt. No. 130 at 4; Dkt. No. 127 at 12; Dkt. No. 139 at 13; Dkt. No. 125 at 10. In the Ninth Circuit, “in order to make out a *prima facie* case, it is *not* necessary to show actual participation or the *exercise* of actual power.” *Everex*, 228 F.3d at 1065. See *UTStarcom*, 617 F. Supp. 2d at 979-80.

⁸⁵ Lesjak, Murrin, and Robison argue that “the Complaint makes no serious claim that [Lesjak] exercised actual control over any of the other Individual Defendants.” Dkt. No. 136 at 11-12; Dkt. No. 142 at 8; Dkt. No. 130 at 7. The Complaint, however, alleges that Lesjak and Robison controlled HP, not the Individual Defendants. See ¶¶119, 124, 240 (“the Insider Defendants acted as controlling persons of HP within the meaning of §20(a)...”); *Middlesex*, 527 F. Supp. 2d at 1193-94 (company’s CFO, Senior Vice President, Corporate Development, and Senior Vice President of Finance liable under 20(a) because their “respective positions gave them control over [defendant corporation]”). “[Lane’s] reliance upon *GlenFed* is equally tenuous.” *Apollo*, 690 F. Supp. 2d at 968-69; Dkt. No. 130 at 1, 4-5&n.; Dkt. No. 131 at 13. “[T]he ‘holding of *GlenFed* does not apply to the situation..., where,’ as here, ‘liability is not dependent upon showing that the control person engaged in fraud.’” *Id.*

1 they “believed in good faith that they were not perpetrating a fraud.” *Nordstrom, Inc. v. Chubb &*
2 *Son, Inc.*, 54 F.3d 1424, 1434 (9th Cir. 1995); *see In re MannKind Sec. Actions*, 835 F. Supp. 2d
3 797, 819 (N.D. Cal. 2011).⁸⁶

4 Section 20(a) claims need only “be pleaded in accordance with [Rule] 8(a)(2), requiring
5 that the plaintiff provide ‘a short and plain statement of the claim showing that the pleader is
6 entitled to relief.’” *Apollo*, 690 F. Supp. 2d at 967; Dkt. No. 130 at 1, 4-5 & n.3; Dkt. No. 131 at
7 13. Indeed, since this Court decided *Howard v. Hui*, 2001 WL 1159780 (N.D. Cal. 2001), “the
8 weight of recent case law indicates that” the “appropriate [pleading] standard” under §20(a) is
9 Rule 8. *Radiant*, 2011 U.S. Dist. LEXIS 124631, at *26; *Siemers v. Wells Fargo & Co.*, 2006
10 U.S. Dist. LEXIS 60858, at *42 (N.D. Cal. 2006); *Batwin*, 2008 U.S. Dist. LEXIS 52365, at *75
11 (“The Court respectfully declines to follow [*Splash*]”). “[I]t is reasonable to presume that these
12 officers had the power to control or influence the particular transactions giving rise to the
13 securities violation.”⁸⁷ *In re Turbodyne Techs., Inc. Sec. Litig.*, 2000 U.S. Dist. LEXIS 23020,
14 at *42 (C.D. Cal. 2000).

15 Here, Defendants Whitman, Apotheker, and Lesjak were HP’s Class Period CEOs and
16 CFO, respectively, were actively involved in HP’s day-to-day operations and made numerous
17 allegedly false and misleading statements on conference calls, SEC filings and otherwise. ¶¶111-
18 14, 119-24. Defendant Lynch was HP’s Executive Vice President of Information Management,

19 ⁸⁶ Lane argues that he is not liable under 20(a) because he acted in good faith. Dkt. No. 131
20 at 14 n.8, 15. It is well established in this Circuit that culpability is not required to plead control.
21 *Apollo*, 690 F. Supp. 2d at 975; *see also Nguyen v. Radiant Pharms. Corp.*, 2011 U.S. Dist.
22 LEXIS 124631, at *29 (N.D. Cal. 2011) (same); *In re Juniper Networks, Inc. Sec. Litig.*, 542 F.
23 Supp. 2d 1037, 1054 (N.D. Cal. 2008) (“[C]ulpability and corresponding particularity arguments
24 are properly asserted in [defendants’] Answer, not a 12(b)(6) motion.”); *Middlesex*, 527 F. Supp.
25 2d at 1193 (same); *Cylink*, 178 F. Supp. 2d at 1089 (same); *Rodriguez v. Countrywide Homes*,
2008 U.S. Dist. LEXIS 82874, at *7 (E.D. Cal. 2008) (same). Lane’s authority is not to the
contrary. In *Donohoe*, 30 F.3d at 912, the Seventh Circuit stated, at **summary judgment**, that
“because good faith was an affirmative defense to control person liability, the burden of **proving**
good faith was on the defendants.”

26 ⁸⁷ Despite these allegations, Lane, Lynch and Murrin suggest that Plaintiff’s allegations are
27 analogous to those in several cases where “boilerplate” language was the **only** allegation of
28 control. *See* Dkt. No. 131 at 14; Dkt. No. 125 at 10-11; Dkt. No. 130 at 6-7; Dkt. No. 139 at 15.
In re Metawave Commc’ns Corp. Sec. Litig., 298 F. Supp. 2d 1056, 1091 (W.D. Wash. 2003)
refused to credit allegations of control based merely on defendant’s position as “a sales executive
responsible for international sales.”

1 one of HP's top 15 officers, and was in charge of one of HP's largest divisions from October
2 2011 to May 2012. ¶45. Robison was HP's Executive Vice President and Chief Strategy and
3 Technology Officer from May 2001 to November 2011, ¶117, and was also a member of HP's
4 Executive Counsel and helped shape the Company's strategy and technology research agenda.
5 *Id.* Robison also led HP's Autonomy due diligence and spoke at HP's investor conferences on
6 the Company's behalf. ¶¶38, 117, 171, 174. Likewise, the Complaint alleges that Lane was
7 heavily actively involved in HP, including the Autonomy negotiations and making false and
8 misleading statements. ¶¶31, 33, 67, 177. Defendant Murrin was HP's Chief Accounting
9 Officer during the Class Period. ¶116. Thus, the Individual Defendants "were actively involved
10 in the day-to-day operations of [the Company and] were senior executives." *See Diamond*
11 *Foods*, 2012 U.S. Dist. LEXIS 170704, at *39; *see also Radient*, 2011 U.S. Dist. LEXIS 124631,
12 at *28; ¶¶119, 123, 240.⁸⁸

13 Moreover, in this Circuit, "director status 'is a sort of red light' that indicates the
14 potential for day-to-day involvement in a company.'" *Apollo*, 690 F. Supp. 2d at 976 (quoting
15 *Fouad v. Isilon Sys.*, 2008 U.S. Dist. LEXIS 105870, at *35 (W.D. Wash. 2008)). Here,
16 Whitman and Lane sat on HP's Board of Directors. ¶¶110, 115. Likewise, "when a corporate
17 officer signs a document on behalf of the corporation, that signature will be rendered meaningless
18 unless the officer believes that the statements in the document are true." *Everex*, 228 F.3d at
19 1061.⁸⁹ Because Defendants Lane, Murrin, Whitman and Lesjak all signed SEC filings "that are
20 alleged to have contained actionable misrepresentations...[the] approvals through signing
21 sufficiently allege control over those who have been alleged to have violated Section 10(b)." *In*

22 ⁸⁸ *Everex*, 228 F.3d at 1067 supports Plaintiff's claim. Dkt. No. 131 at 14; Dkt. No. 125 at
23 10-11; Dkt. No. 130 at 6-7. There, the Ninth Circuit dismissed claims against an alleged control
24 person who "served as a director for less than three months during the class period" and plaintiff
25 provided "no specific indication that [he] supervised or had any responsibility for the preparation
26 of financial statements." *Id.* By contrast, in *Everex*, control claims were allowed to go forward
against a defendant because "although [he] did not work on the projections and did not make
much of a review of the financial statements...[he] was authorized to participate in the release of
the financial statements and signed off on the statements as correct." 228 F.3d at 1066.

27 ⁸⁹ *Paracor Fin., Inc. v. GE Capital Corp.*, 96 F.3d 1151, 1163 (9th Cir. 1996) is a summary
28 judgment opinion. Dkt. No. 130 at 6. Moreover, the alleged control person in *Paracor* did not
sign the company's financial statements. *See Everex*, 228 F.3d at 1065-66.

1 *re WorldCom, Inc. Sec. Litig.*, 294 F. Supp. 2d 392, 420 (S.D.N.Y. 2003); ¶¶111-16.⁹⁰ “It makes
2 sense that the authority to sign and certify the contents of a registration statement implies the
3 authority to effectuate changes to that statement by withholding certification.” *See In re Charles*
4 *Schwab Corp. Sec. Litig.*, 257 F.R.D. 534, 555 (N.D. Cal. 2009).

5 The Individual Defendants’ suggestion that Plaintiff was required to plead their ability to
6 control over the “statements” at issue, the “transactions at issue,” or “with respect to Autonomy,”
7 and that the “concept of control in the context of a recently-acquired, foreign subsidiary
8 comprising a minor portion of the Company’s overall revenue makes little sense” is without
9 merit. Dkt. No. 136 at 12, n.17; Dkt. No. 131 at 14; Dkt. No. 130 at 1-5, 8. The control person
10 “inquiry must revolve around the ‘management and policies’ of the corporation, not around
11 discrete transactions.” *Paracor*, 96 F.3d at 1162; Dkt. No. 131 at 13. The out-of-circuit
12 authorities Defendants rely on that do require a plaintiff to demonstrate that a defendant “had an
13 ability to control the specific transaction or activity upon which the primary violation is based”
14 are not the law in this Circuit. *See, e.g., In re ArthroCare Corp. Sec. Litig.*, 726 F. Supp. 2d 696,
15 730 (W.D. Tex. 2010); Dkt. No. 136 at 11-12 (citing *ArthroCare*); *Apollo*, 690 F. Supp. 2d at
16 975.

17 **V. CONCLUSION**

18 For the foregoing reasons, Plaintiff respectfully submits that the Defendants’ motions to
19 dismiss should be denied. In the event the Court grants, in whole or in part, the motions to
20 dismiss, Plaintiff requests leave to amend. *See* Fed. R. Civ. P. 15(a) (“The court should freely
21 give leave when justice so requires.”).

22
23 ⁹⁰ Citing *In re Gupta Corp. Sec. Litig.*, 900 F. Supp. 1217, 1227, 1241-43 (N.D. Cal. 1994),
24 Murrin argues that the fact that he signed the false Annual Report is insufficient to allege control.
25 Dkt. No. 130 at 6. *Gupta*, however, cited *Burgess v. Premier Corp.*, 727 F.2d 826, 832 (9th Cir.
26 1984), which required plaintiffs to make a “showing of actual participation in the corporation’s
27 operation or some influence before the consequences of control may be imposed.” *Burgess* was
28 decided prior to *Hollinger*. “Prior to *Hollinger*, it was clear that a plaintiff needed to show
actual participation to make out a prima facie §20(a) case in this circuit.’ *Hollinger* ‘shifted the
burden to the defendant[,]’ however, ‘to show that she, acted in good faith and did not directly or
indirectly induce the violations.’” Consequently, “it is not necessary to show actual participation
or the exercise of power[.]’ to make out a prima facie §20(a) claim in the Ninth Circuit.” *Apollo*,
690 F. Supp. 2d at 970-71.

1 Dated: August 30, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2013, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on August 30, 2013.

KESSLER TOPAZ MELTZER
& CHECK, LLP

/s/ Ramzi Abadou
RAMZI ABADOU